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vol. # 2685

No. 12628

United States
Court of Appeals
for the Ninth Circuit.

SUNBEAM FURNITURE CORP., ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, Doing Business as SUNBEAM FURNITURE SALES CO.,

Appellants,

vs.

SUNBEAM CORPORATION,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

No. 8727-Y Civil

SUNBEAM CORPORATION, a corporation,

vs.

Plaintiff,

SUNBEAM FURNITURE CORPORATION, et al.,

Defendants.

Honorable Leon R. Yankich, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, February 14, 1950

Appearances:

For the Plaintiff:

ROGERS AND WOODSON, by:
BEVERLY W. PATTISHALL, ESQ.,
122 South Michigan Avenue,
Chicago, Illinois;

JOHN F. McCANNA, ESQ.,
5600 Roosevelt, Chicago, Illinois;

LYON & LYON, by:
REGINALD E. CAUGHEY, ESQ.,
811 West Seventh Street,
Los Angeles, California.

For the Defendants:

HUEBNER, BEEHLER, WORREL,
HERZIG & CALDWELL, by:

VERNON D. BEEHLER, ESQ.,
610 South Broadway,
Los Angeles, California.

Tuesday, February 14, 1950. 2:00 P. M.

The Court: All right, gentlemen.

Mr. Pattishall: Miss Wilson.

RUTH L. WILSON

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Miss Ruth Wilson.

Direct Examination

By Mr. Pattishall:

Q. Would you give me your full name, please?

A. Miss Ruth L. Wilson.

Q. Where do you live, Miss Wilson?

A. 2328 Hollister Terrace, Glendale.

Q. What is your occupation, Miss Wilson?

A. I work for my father in an appliance shop in Glendale.

Q. What is the name of that business?

A. J. H. Wilson Appliance Shop.

(Testimony of Ruth L. Wilson.)

Q. How long has your father owned that business?

A. Well, 20 to 25 years we have been in business.

Q. How long have you done work in the shop?

A. Well, ever since I can remember, since I have been a little girl. I have been raised in it. [79]

Q. You work there full time now?

A. Yes, sir.

Q. How long have you been working there full time? A. Since 1946.

Q. Did you ever deal with the trade?

A. Yes, sir.

Q. Is that a matter of regular experience?

A. Yes, sir.

Q. How long has that been going on?

A. Oh, all of that time and prior. All the way through high school.

Q. What sort of merchandise does the store sell?

A. Electrical household wares.

Q. Is it a retail store? A. Yes, sir.

Q. Would you name some of the lines that you handle?

A. Well, we have large appliances, washers and ironers and refrigerators. And then the small appliances.

Q. What brands do you handle?

A. In the large or in the small?

Q. Just name a few.

A. Maytag and Easy and Servel, General Electric, Sunbeam.

Q. Is that more or less a complete description of the merchandise that your store sells? [80]

(Testimony of Ruth L. Wilson.)

A. You mean the electrical goods?

Q. No. If there is some other merchandise, will you tell us what that is, please?

A. Well, hand irons, toasters and waffle irons and mixers.

Q. You mentioned the Sunbeam line. Do you handle the complete Sunbeam line?

A. Yes, sir.

Q. What company puts that line out, do you know? A. The Sunbeam Corporation.

Q. When people come into your store to buy a product of that company, what do they ask for?

A. They will ask for a Sunbeam iron or toaster, waffle iron.

Q. What do you give them?

A. Whatever they ask in the Sunbeam line.

Q. Is that what they appear to expect to get?

A. When they ask specifically for it.

Q. How long have you yourself been familiar with the Sunbeam line by that name?

A. Well, ever since I have been in the store, since I have been old enough to know.

Q. Do you ever do any buying for the store?

A. Yes, sir.

Q. Is that a large part of your duties? [81]

A. That is part of them.

Q. Do you ever order any Sunbeam products?

A. Yes, sir.

Q. By what name do you order, when you want some Sunbeam products?

(Testimony of Ruth L. Wilson.)

A. Just Sunbeam toaster or waffle iron.

Q. Have you ever heard of the Sunbeam Furniture Corporation, the defendant in this case?

A. Yes, by advertisements.

Q. Have you ever purchased anything from them? A. Yes.

Q. Would you tell me about it, please, in your own words, briefly?

A. Well, we were asked to purchase a Sunbeam lamp and we called the Sunbeam Furniture Company and they sent a salesman out and we ordered it, and we picked one up. We had an order for two, and we went down and picked one up. And we received it. And then later we received an additional two.

Q. Did the lamps you purchased have the label on them reading "Sunbeam"?

A. Yes, sir.

Q. I refer your attention to a table lamp sitting on the counsel table here in front of you. Is this one of the lamps you purchased from the defendant Sunbeam Furniture Corporation? [82]

A. Yes, sir.

Q. Was the label that you see attached on it, attached to it at the time you purchased it?

A. Yes, sir.

Mr. Pattishall: I am going to take that label off and ask it be marked for identification.

The Clerk: Plaintiff's Exhibit 7 marked for identification.

(Testimony of Ruth L. Wilson.)

(The label referred to was marked Plaintiff's Exhibit No. 7 for identification.)

By Mr. Pattishall:

Q. Miss Wilson, I show you Plaintiff's Exhibit 7 for identification, which is a tag or label bearing the word "Sunbeam," and ask you if that is the label which was on one of the lamps which you purchased from the defendant Sunbeam Furniture Corporation. A. Yes, sir.

Q. What was the occasion of your making the purchase of Sunbeam lamps?

A. Mr. Conley asked us to purchase the Sunbeam lamp for him.

Q. Who is Mr. Conley?

A. Mr. Conley is with the Sunbeam Corporation.

Mr. Pattishall: Please mark this for identification as Plaintiff's Exhibit 8.

The Clerk: Plaintiff's Exhibit 8 marked for identification. [83]

(A sheaf of documents was marked Plaintiff's Exhibit No. 8 for identification.)

By Mr. Pattishall:

Q. Miss Wilson, I show you Plaintiff's Exhibit 8 for identification, which appears to be a sheaf of invoices, shipping orders, and so forth, stapled together, and ask if you will examine them, please.

(Witness complies.) [84]

Q. Referring to the sheaf of invoices, purchase

(Testimony of Ruth L. Wilson.)

orders, Plaintiff's Exhibit No. 8 for identification, Miss Wilson, would you tell me what you know about them, whether or not you recognize them?

A. Yes, sir; the purchase order is one that I wrote up, a copy of it, and the others are the bill and the shipping orders that we got when we received the lamp.

Q. Did you contact any salesman or were you contacted by any salesman in connection with this purchase?

A. Yes, a salesman came out and talked—brought the book, their catalogue, out and showed them to us, and we ordered from that.

Q. Who was that salesman, do you know?

A. I don't recall his name.

Q. What concern did he say he was from, if any?

A. Well, he wrote it down as Sunbeam Furniture, I believe it was Expert.

Q. He wrote Sunbeam Furniture Corporation on it? A. No. It was written on the order.

Mr. Pattishall: I offer Plaintiff's Exhibits 7 and 8, for identification, into evidence as Plaintiff's Exhibits 7 and 8.

The Court: All right.

The Clerk: Plaintiff's Exhibits 7 and 8 in evidence. [85]

(The documents, heretofore marked Plaintiff's Exhibits 7 and 8, were received in evidence.)

Q. (By Mr. Pattishall): Referring your atten-

(Testimony of Ruth L. Wilson.)

tion again to Plaintiff's Exhibit 8, would you examine the calling card, business card, attached in back, which says "Phil Ain Sunbeam Furniture Corporation"; was that left by this salesman that you spoke of? A. Yes, sir.

Mr. Pattishall: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Beehler:

Q. Miss Wilson, I believe you stated that the store your father runs is an appliance store?

A. Yes, sir.

Q. You handle household furnishings in there generally?

A. It is electrical household wares.

Q. It is limited strictly to electrical household furniture? A. Yes, sir.

Q. You don't handle any living room suites?

A. No, sir.

Q. No furniture of any kind? A. No, sir.

Q. Before you purchased the lamp before us here, you never handled any decorative lamps of that kind either, did you? A. No.

Q. And, in fact, as a purchasing agent, let me suggest, for your store, prior to the purchase of this lamp you had never purchased any lamps at all, had you? A. No.

Q. When you purchased this lamp from the Sunbeam Furniture Corporation, you knew that that was not the Sunbeam Corporation of Chicago, didn't you? A. Yes.

(Testimony of Ruth L. Wilson.)

Q. When you were asked by Mr. Condon—was that his name? A. Conley.

Q. (Continuing): ——to purchase a Sunbeam lamp from the Sunbeam Furniture Corporation, you knew at the time that you were not buying a lamp from the Sunbeam Corporation, didn't you?

A. Yes, sir.

Q. Why did you purchase the lamp?

A. Mr. Conley asked if we would.

Q. Was that just because Mr. Conley asked you?

A. Yes, sir, that is all I knew.

Q. That was not the stock in your store, was it?

A. No, sir.

Q. Before you put that order in for a Sunbeam lamp, as appears on the exhibit, did you know or didn't you, that there were such things as Sunbeam lamps?

A. We had seen some advertisements on them.

Q. What advertisements did you see before you wrote out that order?

A. Well, there was a magazine article from a page in a magazine, and I believe we received some literature from the company.

Q. What magazine was that?

A. I don't recall offhand.

Q. When did you see it?

A. Some time ago.

Q. How long ago?

A. Prior to purchasing the lamp.

Q. I couldn't quite hear you.

A. Previously to purchasing the lamp.

(Testimony of Ruth L. Wilson.)

Q. Would you repeat it again, please? I can't hear you.

A. Previous to purchasing the lamp.

Q. A year ago, or five years ago, or a month ago? A. Within the last year.

Q. And you say you don't recall what magazine it was? A. No, I don't. [88]

Q. What magazines do you subscribe to?

A. Well, we get all the electrical magazines, and anything that pertains to our business.

Q. Did the Sunbeam advertisement appear in one of the electrical magazines?

A. I don't recall.

Q. What did that advertisement look like? Do you remember what it looked like?

A. It was a lamp advertisement, and it said, "Sunbeam Lamps."

Q. What kind of lamps were advertised?

A. Decorative and household lamps.

Q. Was the Sunbeam Furniture Company name used in connection with the ad? A. Yes, sir.

Q. Are you familiar with the name Expert Lamp Company? A. That was along with it.

Q. When you purchased this lamp did that have a tag on it with the name "Expert Lamp Company" on it?

A. I think that was down below on it. "Sunbeam" was the large letters, and then that was down below.

Q. Did that tag have the name "Sunbeam Furniture Corporation" on it, too?

(Testimony of Ruth L. Wilson.)

A. I don't know.

Q. Will you examine the tag and tell me whether that [89] is the tag you saw? A. Yes, sir.

Q. You don't find the name "Sunbeam Furniture Corporation" on there, do you?

A. No, sir.

Q. Did you personally, Miss Wilson, write out this purchase order No. 5516, which appears in Plaintiff's Exhibit No. 8? A. Yes, sir.

Q. What prompted you to order that lamp as a Sunbeam lamp?

A. Well, that is the way it was written up in the advertisement.

Q. Did you have the advertisement before you when you wrote that? A. Yes, sir.

Q. And that was an advertisement in what magazine? A. I don't recall the magazine.

Q. You wrote this order on October 20th of last year? A. Yes, sir.

Q. You don't remember that long ago?

A. There was a lot of business between that and now.

Q. How many lamps have you ordered since that time?

A. We ordered a pair, and then we picked up one, and then shortly after that we received two additional ones. [90]

Q. And are those all of the lamps that you ever ordered? A. Yes, sir.

Q. When the Sunbeam salesman came to your

place of business, you knew that he represented the Sunbeam Furniture Corporation, didn't you?

A. Which salesman are you talking about?

The Court: You asked that question and she answered it. She ordered it purposely from him under that name.

Mr. Beehler: I don't recall, your Honor, that we talked about the salesman.

The Court: You knew you were ordering something not made by the Sunbeam Company who makes the Mixmaster and other things?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Beehler): When you ordered the Sunbeam lamp from the Sunbeam Furniture Corporation, you represented yourself, did you not, as a retail dealer? A. Yes, sir.

Q. Not as an independent purchaser?

A. Yes, sir.

The Court: Did I understand you to say that the salesman called at your place of business?

The Witness: Yes, sir, he called. [91]

The Court: He knew the business you were in?

The Witness: Yes, sir.

Q. (By Mr. Beehler): Miss Wilson, do you still have in your store the magazine that you say you saw the advertisement in?

A. I don't recall offhand if I do or not.

Q. Is the magazine the only place that you saw the advertisement? A. Yes, sir.

Q. Do you have any other literature that you

(Testimony of Ruth L. Wilson.)

saw the advertising of lamps distributed by the Sunbeam Furniture Corporation?

A. There was some, but I don't believe I have them.

Q. Will you, Miss Wilson, before court convenes in this case, produce the magazine in which you saw it, if you can find it?

The Court: If she has it.

The Witness: I have thrown out most of last year's magazines.

The Court: If you have it, turn it over to counsel before tomorrow or by tomorrow. If not, forget about it.

Mr. Beehler: That is all.

Mr. Pattishall: No redirect.

The Court: Step down. Call the next witness.

Mr. Pattishall: Miss Gibson. [92]

MARY GIBSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Mary Gibson.

Direct Examination

By Mr. Pattishall:

Q. Give me your full name, please, Miss Gibson.

A. Mary Gibson.

Q. Where do you live?

(Testimony of Mary Gibson.)

A. South Pasadena.

Q. Your street address, please?

A. 341 Hawthorne Street.

Q. What is your occupation?

A. An interviewer for Marketing Research Company.

Q. How long have you been engaged in that work? A. Approximately two years.

Q. What did you do prior to that?

A. I hadn't worked for some little time prior to that. I have done industrial X-raying and medical laboratory work. [93]

Q. Have you ever attempted to purchase the Sunbeam lamps? A. Yes, I have.

Q. Will you tell me about it,. please?

A. Yes. I went with Mr. Robert Enfield up to the Sunset Home Furniture Company.

Q. Are you testifying from note?

A. Yes, I am. Is there any objection?

Q. Are they notes made at the time?

A. I made these notes as soon as I came out of the store.

Mr. Pattishall: Is there any objection?

Mr. Beehler: No. That is all right.

The Court: Go ahead.

The Witness: I went in with Bob Enfield to get a tag from a Sunbeam lamp they said they could order for us.

Q. (By Mr. Pattishall): Who is Mr. Enfield?

A. He is employed by Lampa and Christopherson.

(Testimony of Mary Gibson.)

Q. What is their work?

A. Trade-mark research.

Q. Proceed.

A. We talked with Mr. Lane, and in talking to him, I told him that I had a Sunbeam Mixmaster—Sunbeam mixer, rather, and was curious to know if it was the same company that made the lamps. [94]

He said it was the same corporation, but a different division. They made all kinds of electrical appliances.

I asked him, "Is it the same company that makes the Sunbeam mixers?"

He said, "Yes."

Q. Will you give us the address of this place?

A. No, I cannot definitely. It is on Sunset Boulevard, out near Garner Junction. I imagine it is approximately in the 7300 block.

Q. Do you remember the name of the place?

A. Yes. Sunset Home Furniture Company.

Then we also went to the Kay's Department Store. I went in there by myself.

I asked to look at some—rather—I didn't ask to look at them. I looked around the store and saw some Sunbeam lamps and told the man I was interested in some figurine lamps.

Q. Did those lamps carry tags on them, similar to——

A. They carried a Sunbeam tag on them.

Q. Were the Sunbeam tags you refer to similar to Plaintiff's Exhibit 8, which I show you?

A. This one, you mean (indicating)?

(Testimony of Mary Gibson.)

Q. Yes. A. Yes, they were.

Q. Proceed.

A. I talked to Mr. Weinstein, who was a buyer in there. [95] I told him I had a Sunbeam toaster and wanted to know if it was the same company that made the lamps.

He said he didn't know, but it could be. That the Sunbeam put out a number of electrical appliances, mixers, shavers, and so forth. The lamps were made in Chicago, so that it may be.

At the time I told him I didn't want to make any definite decision, I would like to bring my roommate back with me to look at them.

He said if I had looked at any ceramic figurines I would realize what a bargain I was getting. That he was a buyer and for that reason he knew a bargain when he saw one.

Mr. Pattishall: Thank you. That is all.

Cross-Examination

By Mr. Beehler:

Q. Mrs. Gibson, you stated, I believe, the lamps you saw had on them a tag like Plaintiff's Exhibit No. 7?

A. If by this, you mean this tag, yes (indicating).

Q. What made you think that the lamp you saw that tag on was distributed by the Sunbeam Furniture Corporation?

A. I don't recall saying that I thought it was distributed by them.

(Testimony of Mary Gibson.)

Q. You knew then it was not, is that correct?

A. I merely knew it said "Sunbeam lamp" on it.

Q. You did know, Mrs. Gibson, didn't you, that that [96] lamp was not distributed by the Sunbeam Furniture Corporation?

A. That it was not distributed by the Sunbeam Corporation?

Q. That it was not.

A. No, I did not know it was not distributed by them.

Q. Had you ever heard of the Sunbeam Furniture Corporation before you saw that lamp?

A. No, I had not.

Q. So you never knew there was such a corporation in existence? A. That is correct.

Q. Then it is true, is it not, that you do not tie nor connect in any way the lamp which you saw that tag on with Sunbeam Furniture Corporation? That is true, isn't it?

A. I merely connected it with a Sunbeam lamp.

Q. Will you tell me again, Mrs. Gibson, the name of the department store that you referred to in your direct testimony?

A. Yes, Kay's Department Store.

Q. How do you spell Kay's?

A. (Spelling) K-a-y-'-s.

Q. Had you ever been in that store before you went out on this survey? A. No, I had not.

Q. Had anyone in that store ever mentioned Sunbeam [97] Furniture Corporation to you?

A. No.

(Testimony of Mary Gibson.)

Q. Now, you mentioned, I believe, the Sunbeam Home Furniture Company. Is that the correct name of it? A. No, it is not.

Q. What is the correct name?

A. The Sunset Home Furniture Company.

Q. Do you know whether or not that has any connection whatsoever in any way with the Sunbeam Furniture Corporation?

A. I have no way of knowing.

Q. Did you say you saw a lamp at that company's premises? A. No, I did not.

Q. What did you see at the premises of the Sunset Home Furniture Company?

A. I didn't say I saw anything. I said I went in with Mr. Enfield to take a tag from a Sunbeam lamp they had told him they could order for us.

Q. Did you see one there?

A. I didn't look.

Q. You didn't see one then?

A. I didn't look.

The Court: She said she did not look.

Mr. Beehler: It is quite obvious she didn't see one then.

The Court: You are arguing. She is a researcher. Do [98] not argue. Do not argue with that kind of a witness. She is a trained witness.

Step down.

(Witness excused.)

Mr. Pattishall: Mrs. Brandenburg.

ANNE BRANDENBURG

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Mrs. M. C.

Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name?

A. Anne Brandenburg.

Q. Mrs. M. C. Brandenburg?

A. That is right.

Q. Where do you live, Mrs. Brandenburg?

A. 143 South Adams Street, in Glendale.

Q. What is your occupation?

A. I am a housewife.

Q. Are you familiar with the trade-mark Sunbeam? A. Yes, sir.

Q. How long have you been familiar with that trade-mark?

A. Oh, I would say about 15 years. [99]

Q. When you see or hear the trademark Sunbeam, does it bring to your mind any particular concern?

A. Well, I have a number of Sunbeam appliances in my home, and when I see that I imagine they have all been made by the Sunbeam Company.

Q. Would you name some of those appliances for us and tell us what they are?

A. I have a mixer and a coffee master and an

(Testimony of Anne Brandenburg.)

iron, and my husband has had two or three razors, Sunbeam razors.

The Court: Has he changed them with the change of style?

The Witness: That is right.

The Court: It is very expensive to change the style, too.

The Witness: He says the last is so much better than the first, he had to try it.

Q. (By Mr. Pattishall): Does the old one still run?

A. His father is using his old one.

Q. How long would you say you have known of Sunbeam products?

A. I think about 15 years.

Q. Those are the products you have just mentioned?

A. Yes. I haven't had them that long, but I have known of them. In fact, a friend of mine bought a mixer for her sister one time for Christmas. I had it in my home shortly before Christmas, so she didn't take it home. I always thought I wanted a mixer like that. [100]

Q. Under what name have you known them for 15 years. A. Sunbeam.

Q. Based upon your experience, will you tell us briefly what you think of Sunbeam products, as to their quality? A. I think they are very fine.

Mr. Pattishall: Thank you.

Mr. Beehler: No questions.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pattishall: Mrs. Hampshire.

JESSIE HAMPSHIRE

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jessie Hampshire.

Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name, please?

A. Jessie Hampshire.

Q. Miss or Mrs? A. Mrs. Charles E.

Q. Where do you live, Mrs. Hampshire?

A. 1465 Monte Vista, in Pasadena. [101]

Q. What is your occupation?

A. Housewife.

Q. Are you familiar with the trademark Sunbeam? A. Yes, I am.

Q. What does it mean to you?

A. Well, it means electrical products we have in our home, what I have, I suppose, in particular. I have a mixer and a waffle maker.

Q. How long has it had that meaning to you?

A. Oh, quite a number of years, because I have been in the market for one for that long, and so many people I have talked to told me to be sure and get that one, instead of something else.

(Testimony of Jessie Hampshire.)

Q. Have you ever noticed any advertising by that concern? A. Beg pardon?

Q. Have you ever noticed any advertising by that concern? A. By the Sunbeam?

Q. Yes, ma'am.

A. I have noticed the Sunbeam. You know, mixers and Sunbeam waffle makers, things like that.

Q. You have noticed advertising, advertising those articles? A. Yes. [102]

Q. How many years would you say you have observed such advertising?

A. In the homes of my friends, probably around the last five or six years.

Q. You say in the homes of your friends?

A. Yes. I haven't had one too long, myself. When talking to friends over the last five or six years, you know, they have referred me to that particular brand, because they felt it was best. You talk about one—"Well, should I get a Hammond-Beach or a Sunbeam?" And they refer to Sunbeam.

Q. Based on your experience, what would you say as to the quality of Sunbeam merchandise?

A. I think it is wonderful.

Mr. Pattishall: Thank you.

Mr. Beehler: No cross-examination.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pattishall: Mrs. Fitzhugh.

Mr. Beehler: May I suggest, your Honor, that if the purpose of these witnesses is to prove that

(Testimony of Jessie Hampshire.)

Sunbeam products are good products, the defendants are willing to admit that.

The Court: That is only one part of the testimony. We will take that admission.

The object of this testimony is broader than that. It [103] is to say that the word "Sunbeam" spells the products of this company. If you are ready to admit that, we will take the admission.

Mr. Pattishall: Your Honor, I have about seven or eight more witnesses of the same character. Perhaps counsel would stipulate that the remaining witnesses will testify substantially the same as the first two. It might expedite matters.

Mr. Beehler: As Mrs. Brandenburg and Mrs. Hampshire?

Mr. Pattishall: Yes.

Mr. Beehler: I am willing to stipulate that.

The Court: Then let us have for the record the names of the witnesses.

GLADYS FITZHUGH

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Mrs. James C. Fitzhugh.

Direct Examination

By Mr. Pattishall:

Q. What is your first name? A. Gladys.

(Testimony of Gladys Fitzhugh.)

Mr. Pattishall: Thank you, Mrs. Fitzhugh. You may step down.

The Court: All right.

(Witness excused.) [104]

The Court: Give the Clerk the names of the other witnesses.

Mr. Pattishall: Mrs. William Rhodes.

The Court: What is the given name?

Mrs. Rhodes: Audrey Eleanor Rhodes.

Mr. Pattishall: Where do you live?

Mrs. Rhodes: 79 North Craig, Pasadena.

Mr. Pattishall: Mr. M. C. Saunders.

Mr. Saunders: Yes.

Mr. Pattishall: Is that your correct name?

Mr. Saunders: Yes.

Mr. Pattishall: What is your address?

Mr. Saunders: 324 Monterey Road, South Pasadena.

Mr. Pattishall: Marshall Mercer.

Mr. Mercer: Yes.

Mr. Pattishall: Will you give your full name and address, please, sir?

Mr. Mercer: Marshall M. Mercer. 1526 East Windsor Road, Glendale, California.

Mr. Pattishall: Mr. Lovin. Will you give your name and address, please, sir?

Mr. Lovin: C. H. Lovin, 319½ East Chestnut, Glendale.

Mr. Pattishall: Mr. Nickelson.

Mr. Enfield: Mr. Nickelson isn't here. He is due to come in a little later. [105]

Mr. Pattishall: Do you have his name and address?

Mr. Enfield: Yes.

Mr. Pattishall: E. L. Nickelson.

Mr. Enfield: 2957 Francis Avenue, Los Angeles.

Mr. Pattishall: Mr. Enfield.

ROBERT E. ENFIELD

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert E. Enfield.

Mr. Pattishall: I suppose these other ladies and gentlemen may be excused?

The Court: They may be excused.

Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name, please?

A. Robert E. Enfield.

Q. Where do you live, Mr. Enfield?

A. I live at 4934 North Damen Avenue, Chicago, Illinois.

Q. What is your occupation?

A. Trademark research.

Q. For how long have you been so employed?

A. For slightly over a year and a half.

Q. For what firm do you work?

(Testimony of Robert E. Enfield.)

A. For the firm of Lampa and Christophersen in Chicago.

Q. You have worked for them for a year and a half? A. Yes. [107]

Q. What did you do before you went into that work?

A. I was a student at the University of Iowa just before being employed by them, and before that I was an officer in the United States Army, in the Air Force.

Q. Were you a pilot? A. Yes.

Q. Where were you a student?

A. In the University of Iowa.

Q. What subject did you major in?

A. I majored in psychology and did a lot of my work in the measurement of public opinion, in the theory behind it.

Q. Did you obtain your degree in that field?

A. Yes.

Q. A bachelor's degree, of course?

A. Yes.

Q. Have you ever bought any Sunbeam lamps in the Los Angeles area? By that I mean lamps that have the word "Sunbeam" on them treated as a trademark? A. Yes.

Q. Will you tell me about it, please?

A. I went to a furniture store down on South Broadway called the Vander Furniture Mart, and I had a conversation with the sales person there, and finally he agreed to call the Sunbeam Furniture Corporation showroom and tell them that I was

(Testimony of Robert E. Enfield.)

coming in to look at some merchandise as a consumer, [108] and I went to the Sunbeam Furniture Corporation showroom and I picked out and purchased a table lamp bearing two tags, both tags stating "This is a genuine Sunbeam lamp." I paid for the lamp in cash and carried it out of the store room myself. They placed it in a furniture packing box for me.

Q. Does Plaintiff's Exhibit No. 1 correspond to that lamp? In other words, is that a photograph of the lamp that you mention?

A. This is a photograph of the lamp I purchased and carried out.

Q. Did you have that photograph made yourself? A. Yes.

The Clerk: Plaintiff's Exhibit 9 marked for identification.

(The documents referred to were marked Plaintiff's Exhibit No. 9, for identification.)

Q. (By Mr. Pattishall): Mr. Enfield, I show you what appears to be an invoice and a shipping order. On the invoice, the top part reads "Sunbeam Furniture Corporation," the shipping order reads the same, Plaintiff's Exhibit 9,. for identification, and ask you to examine it, please, tell me what it is.

A. That is the original order made out in the Sunbeam Furniture Corporation show room for the lamp that I purchased, [109] and the invoice was typed up at the same time and was given to me as a receipt. I signed the invoice at the time I picked up the lamp.

(Testimony of Robert E. Enfield.)

Q. When you say the lamp, you are referring to a lamp that is pictured in Plaintiff's Exhibit 1?

A. I am referring to this particular lamp, yes.

Q. Mr. Enfield, have you ever done any consumer reaction test research in connection with the word "Sunbeam"? A. Yes.

Q. Tell me what your assignment was, who gave you the assignment, and what you did to carry it out, please, as briefly as possible?

A. I was sent a survey sheet from Chicago, from the office of Lampa and Christophersen, and I was instructed to run a public opinion survey or consumer reaction test survey, and I used a picture of the lamp, the same lamp that I had purchased in the ware rooms as a part of the survey. I went to the University of Southern California, to the employment service, and requested that I be allowed to interview five or six reliable girls who could help with this reaction test. I interviewed the girls and picked out three to do the actual interviewing for me. The girls were told nothing about the purpose of the survey and, in fact, they were instructed not to divulge any information to any of the people at all if they could possibly help it. In other words, I told them we were [110] interested in getting exactly what the public's reaction was, and therefore if they knew nothing about it they would be much more apt to give us a true picture instead of unconsciously weighting it one way or the other.

Q. Did they know anything about this action?

A. Absolutely nothing about the action. They

(Testimony of Robert E. Enfield.)
didn't know actually who they were representing or anything about it. Some of them might have been able to surmise something from the questionnaires, but I told them definitely we wanted to have them do the work without knowing the purpose of it or the reason.

Q. Did you give them any written instructions?

A. I gave them each a sheet of written instructions just before we started the survey, instructed them to read it over thoroughly, sign it and date it, and keep it with them at all times, and if anything came up relevant to the interviewing of the public, to refer to the sheet of instructions to clear it up. The girls did this, read them over and signed them, and maintained them until the end of the survey, at which time they returned them to me.

The Clerk: Plaintiff's Exhibit 10 marked for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 10, for identification.)

Q. (By Mr. Pattishall): Mr. Enfield, I show you what [111] appears to be a test sheet in blank marked Plaintiff's Exhibit No. 10 for identification. Will you look at it, please? What is it?

A. This is the interview sheet that we used to interview the public, get the reaction tests.

Q. Is that identical to the sheets that you used?

A. Yes.

Q. And which you supplied the girls that you mentioned?

A. Yes. The only difference is this one is not

(Testimony of Robert E. Enfield.)

numbered. The ones that we used for the reaction test were numbered consecutively.

Q. Will you proceed with your story as to what you did?

A. I did just as I was instructed. I hired the girls and I took them out to the area in my automobile and placed them personally on the streets that we had picked out to survey. My instructions called for middle class neighborhoods, so I attempted to get as near middle class as possible. I was aided in this by the employment service at the University of Southern California, as they have a research department that handled these sort of things, and they know the Los Angeles area. They gave me the middle class area to work on.

The Court: You had better not let Mr. Gabrielson hear you use that word "middle class." He says it is a socialistic [112] phrase.

The Witness: That is for want of a better word.

Q. (By Mr. Pattishall): You mean middle income? A. Yes, middle income.

The Court: You will be classified as a Red before you know it. You are young, you will lay yourself open. A university man using that word, it sounds like Marxism. You had better be careful.

Q. (By Mr. Pattishall): Tell me what you did and what you instructed the girls to do, and what the results of your research were.

A. I instructed the girls to follow the written interview sheets, and I personally placed each one on a street, and from time to time I made the rounds and would watch the girls doing the interviewing,

(Testimony of Robert E. Enfield.)

and in the evening of the first day I picked up the interview sheets, and the second day we went to another middle income area and proceeded.

Q. Give me some more-accurate location on these areas that you used.

A. The area in south Los Angeles was in the Crenshaw district, and on 10th and 11th and 12th Avenue in that area; and in the northern area it was Wilshire to Melrose and Highland to Fairfax. And I extended the instructions verbally to include Fairfax, as it had a shopping area that we wanted to catch the shoppers in the afternoon. The girls followed the [113] instructions very well.

Q. How did you know?

A. I, from time to time, went around and observed them and listened to their conversations. From the questions that they asked me they seemed to be trying to do a very good job. I think they did. I tabulated the results, and the results of these surveys indicated that 56.3 per cent of the population indicated confusion between the Sunbeam lamp in the picture and the Sunbeam Corporation products.

Q. When you say "indicated confusion," how do you arrive at that?

A. On the questionnaire there was absolutely no mention of the Sunbeam Corporation or any of its products.

Q. What are the pertinent parts of the questionnaire?

A. The questionnaire reads, "Have you ever bought or seen a lamp bearing the name Sunbeam?" and if the recipient marked "Bought," "Approxi-

(Testimony of Robert E. Enfield.)

mately when?" and the answers could be "Within the past year" "Within the past two years" "More than two years." And the key question, "Do you know whether the company that makes this lamp makes any other product or products?" Nowhere on here is the Sunbeam Corporation or its products mentioned to give the recipient a clew. Yet 56.3 per cent of the population interviewed did list Sunbeam Corporation products, indicating that they were confusing and [114] associating the two products together.

Q. At the time these interviews were made each person interviewed was shown a photograph corresponding and identical to the one seen in Plaintiff's Exhibit No. 1? A. That is correct.

Q. What was the total number of interviews?

A. 261.

The Court: Did you tabulate them yourself?

The Witness: Yes.

The Court: And made the percentages?

The Witness: Yes.

The Clerk: Plaintiff's Exhibit 11 marked for identification; Plaintiff's Exhibit 12 marked for identification; Plaintiff's Exhibit 13 marked for identification.

(The books referred to were marked as Plaintiff's Exhibit Nos. 11, 12, and 13 for identification.)

Q. (By Mr. Pattishall): Will you examine these books marked for identification as Plaintiff's Exhibits 11, 12 and 13, Mr. Enfield? What are they?

(Testimony of Robert E. Enfield.)

A. These are the looseleaf books supplied by me to the three girls that did the actual interviewing, and they contain the interview sheets used, and also the actual photograph used in the survey.

Q. Have there been any alterations or removals or changes in any manner whatsoever to Plaintiff's Exhibits 11, [115] 12 and 13 for identification?

A. None.

Q. How do you know?

A. I just looked through them, and I had been through them just before I came on the stand. [116]

Q. In whose possession were they from the time that they were made?

A. They have been in my possession from the time they were made.

Q. Have you tabulated the results?

A. Yes.

Mr. Pattishall: I offer Plaintiff's Exhibits 11, 12 and 13, for identification, into evidence as Plaintiff's Exhibits 11, 12 and 13.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 11, 12 and 13 in evidence.

(The documents heretofore marked for identification Plaintiff's Exhibits 11, 12 and 13, were received in evidence.)

Q. (By Mr. Pattishall): What sort of code did you use to tabulate them?

A. I would start off on question No. 1, and if the person had bought the lamp I marked a "B" on the right-hand margin in ink; if they had seen

(Testimony of Robert E. Enfield.)

it, I marked a "S"; if they had not seen it, I marked a "N"; and if they did not know, I marked a "D." And in question No. 2, if the person listed a Sunbeam Corporation product, such as the Mixmaster or the toaster, any of the Sunbeam line, I would tabulate that as Confused. In other words, some would be "No, they [117] hadn't seen the lamp," but they would confuse the two. And in the third question I marked under "How much shopping do you do for your household," if they did most of it I marked it with an "M," half of it I marked with a "H," and a little I marked with a "L," and none I marked with an "N."

Q. Leaf through that book that you have in your hand, which is Plaintiff's Exhibit what?

A. 11.

Q. Leaf through it quickly and read to me some of those which you did not count as confusion.

A. I have one here that did not claim to have ever seen the lamp, so it is marked "No," and did not know whether this company that makes the lamp made any other product or products, and it was marked "No"; and that was marked for "Not confused." Another one had not bought——

Q. What number was that page?

A. 171. Another one had not bought or seen a lamp bearing the trade-mark "Sunbeam" was marked "No" for not having seen it; and under the second question they checked "Don't know" as the answer to "Do you know whether the company that makes this lamp makes any other product or products" and I tabulated that as Indefinite. That was

(Testimony of Robert E. Enfield.)

not included in the confused tabulation. That was No. 163.

No. 127 answered "No," they had not bought or seen a lamp [118] bearing the name "Sunbeam," they answered "No," and they did not know whether the company made any other products, so that was tabulated under the indefinite or not confused.

No. 109, the first question was answered by "No" whether they had not seen or bought a lamp bearing the trade-mark "Sunbeam" and the second question they did not know any other products made by the same company, and it was marked not confused and tabulated as such.

No. 107, they had not bought a lamp bearing the trade-mark "Sunbeam" so that that was marked "No, they had not seen it," and under the second question they did list a product "Globes," which could mean most anything, I guess, and that was tabulated as not confused, because we didn't know definitely that it was a Sunbeam product that they were thinking of.

Mr. Pattishall: Thank you, sir, that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Beehler:

Q. Mr. Enfield, you said here that you purchased a lamp from the Sunbeam Furniture Corporation. How did you get into the showroom of the Sunbeam Furniture Corporation?

(Testimony of Robert E. Enfield.)

A. I walked into Vander Furniture Mart on South Broadway and asked him if he carried Sunbeam lamps. He said he didn't, but that he could get one for me, and I asked him [119] how soon he could get one, and he said he could send me right direct to the Sunbeam Furniture Corporation ware room and I could pick one up there. He gave me his card and he called and said I was coming, and I went in.

Q. When you got to the Sunbeam Furniture Corporation's place of business, you had to show this card, didn't you? A. Yes.

Q. Otherwise they would not have let you in, wasn't that your instruction?

A. I didn't try it otherwise. I don't know whether I could have gotten in without the card or not.

Q. You don't know whether you as a private individual could have gotten into the show room, is that correct? A. No, I don't.

Q. The lamp which you allegedly purchased, when it was invoiced, was not invoiced to you, was it? A. Do you mean consigned to?

Q. The invoice was consigned to the furniture company? A. To Vander Furniture Mart.

Q. Not to you?

A. It was marked on here "Paid and picked up by R. E. Enfield," and signed by me. It was not consigned to me.

Q. Did you ask that it be consigned to you?

A. No, I didn't.

(Testimony of Robert E. Enfield.)

Q. When you were at the show room were there any other [120] persons other than the employees around the place in the show room?

A. Yes, there was a family of, I think, four people came in and were looking at some maple furniture.

Q. Were they retailers?

A. No, because they were asking a good many questions, and it was obvious that *we* were purchasing something for their own personal use.

Q. What were their names?

A. I didn't ask them their names.

Q. Where were they from?

A. I have no idea.

Q. At the Sunbeam Furniture show rooms did you see any electrical appliances other than decorative lamps? A. No.

Q. You knew when you were in the Sunbeam show rooms that you were not in any premises connected with the Sunbeam Corporation?

A. Yes.

Q. There was no doubt whatever in your mind?

A. None.

Q. With respect to the survey that you made, you stated, I believe, that you showed these girls who were making the survey a picture?

A. That's correct. [121]

Q. Did you show them the lamp that that was a picture of? A. No.

Q. Did you show them the label that that lamp carried?

(Testimony of Robert E. Enfield.)

A. No, other than to point it out on the shade. It is very obvious in the picture.

Q. Did you point out to them that that label bore the name of the manufacturer, Expert Lamp Company?

A. I didn't point it out to them. I didn't point out the label at all to them. It was simply there for them to observe for themselves.

Q. Of all the people that answered the questionnaire on the survey, did any of them see anything other than the photograph? A. No.

Q. Was the label pointed out to any of them?

A. No.

Q. Was their attention called to the fact that there was a label on the lamp, any of them?

A. Not to my knowledge, no; they simply said "I show you a picture of a table lamp."

Q. Why did you pick college girls for your survey?

A. I was told to get three reliable girls, and I thought a college would be the most likely place to find three reliable girls. [122]

The Court: Besides, they can use the money.

Q. (By Mr. Beehler): Why did you pick the so-called middle-income bracket neighborhoods?

A. I was instructed to do so.

The Court: Mr. Roper uses nothing but college men and college girls to make these surveys. I happen to know, because my own daughter made some of them while she was attending U.C.L.A.

Q. (By Mr. Beehler): Why did you pick that particular lamp?

(Testimony of Robert E. Enfield.)

A. I would imagine the same reason any person would buy the lamp. I just like the looks of it.

Q. Why did you settle on just one lamp? Why didn't you pick 15 different lamps?

A. I intended to carry it out of there myself. I didn't think I could take 15.

Q. Were you ever in a lamp store?

A. Yes.

Q. Were you ever in any one of these downtown department stores where they have lamp departments? A. Yes.

Q. Which one?

A. I have been in the Broadway, the May Company.

Q. Can you give any guess as to how many different kinds of lamps they have in that lamp department in the [123] Broadway?

A. I couldn't venture a guess.

Q. Wouldn't you say there were at least 300?

A. I wouldn't know. I didn't have any occasion to look at the number.

Q. As a matter of fact, in that whole lamp department there were hardly more than 5 lamps the same, were there? A. Probably not.

Q. Do you have any idea in that lamp department, just taking it by way of example, how many different manufacturers of lamps are represented there?

A. There are probably a good many different ones.

Q. When you walked in there, did you investigate any of those lamps for trade-marks?

(Testimony of Robert E. Enfield.)

A. Yes.

Q. How many of the lamps involved did you find trademarks applied to?

A. It is a very difficult question. I didn't count them specifically. I did see a lot of names that I recognized.

Q. When you went in there you went in there in your capacity as a trade-mark investigator, didn't you? A. Yes.

Q. You were definitely interested in trade-marks as a business, weren't you? A. Yes. [124]

Q. As a matter of fact, most of the lamps you saw in there didn't have any trademark on them, did they?

A. Well, I wouldn't say that. I saw a good many that carried the name of Dena and a good many Rembrandts.

Q. You did see an awful lot of them that didn't?

A. A good many of them didn't have tags on them.

Q. All they had on them was the Broadway price tag? A. Yes.

Q. Did you see any lamps in there that were labeled Sunbeam lamps? A. No.

Q. Did you ever anywhere in any furniture store see a Sunbeam lamp for sale? A. Yes.

Q. Where?

A. At the Globe Furniture Company on Washington Street, about 1500.

Q. When you saw that lamp at the Globe Furni-

(Testimony of Robert E. Enfield.)

ture Store, were you led to think that was made by the Sunbeam Corporation?

A. No, I definitely knew it was made by the Expert Lamp Company.

Q. Was there anything about the label or that lamp itself to suggest it might have been distributed by the Sunbeam Furniture Corporation? [125]

A. No.

Q. Now, directing your attention to your survey sheet, Plaintiff's Exhibit 10, you said, I believe, that the tabulation of your item No. 2(b) indicated there, that is, you deduced from that answer that there were about 56.3 per cent persons confused, is that right?

A. 56.3 persons who indicated they were confused by their answers.

Q. By their answers? A. Yes.

Q. Among those 56.3 per cent, how many of them said they did no purchasing for the household?

A. I didn't break it down under that category.

Q. Isn't it true then that although 56.3 per cent might have been listed as confused, they never purchased a lamp in their lives for the household, and that would make your survey mean nothing, wouldn't it?

A. If we can conceive of a situation like that, it would.

The Court: They were not asked if they ever purchased a lamp? Was that one of the questions?

(Testimony of Robert E. Enfield.)

The Witness: That was one of the questions, yes.

The Court: I did not see that.

Q. (By Mr. Beehler): Now, you called our attention to a survey made for one specific lamp, Plaintiff's Exhibit 1. [126] Did you make any survey, general survey for such items as living room furniture? A. No.

Q. Did you make any general survey for such items as kitchen furniture? A. No.

Q. Did you make any general survey for dining room furniture? A. No.

Q. Any survey for occasional furniture?

A. No.

Q. Any survey for hassocks? A. No.

Q. Crockery, dishes? A. No.

Q. Mr. Enfield, have you had other survey experience prior to this one? A. Yes.

Q. You feel yourself well qualified to judge the results of your surveys? A. Yes.

Q. Do you not feel, Mr. Enfield, had you shown these individual people, to whom you presented the questionnaires, the lamp itself with the label hanging on it, that label that we have here in evidence showing the Expert Lamp Company name, do [127] you not think the answers of most of those people would have been different?

A. You are asking for an opinion on that?

Q. Yes.

The Court: Yes.

(Testimony of Robert E. Enfield.)

The Witness: I think it would be almost exactly the same.

Q. (By Mr. Beehler): You think that if they saw the label with the name Expert Lamp Company on it, they would still think that that was made by the Sunbeam Corporation? Is that the way I interpret your answer?

A. The average person would have no way of knowing one way or the other, since they do not know generally the corporate name of any of the manufacturers of named products.

The Court: It is quite obvious on these labels that the words "Expert Lamp Company" are below the mark. The mark is in bold type, both on the large label and on the small label. As the French say, saute aux yeux, meaning to strike you in the face, whereas the other one is a little one. You have to look closely to see it on either label.

Anyone looking at this would be struck immediately by the gold marker of Sunbeam. A person would have to look below that and very closely to see the name Expert Lamp Company.

On the small label it is so small that I doubt if a person who was not looking for it would ever see it. [128]

We are in the realm of speculation. I do not object to the answer. I am giving what to me is an obvious answer, which is a visual answer.

Q. (By Mr. Beehler): Have you yourself, Mr. Enfield, ever purchased decorative lamps for your own home?

(Testimony of Robert E. Enfield.)

A. Not for my own personal use, no.

Q. Have you ever purchased them as a buyer of lamps for any person at all?

A. None other than this particular lamp.

Q. None other than for this particular business survey? A. That is right.

Mr. Beehler: No more questions.

The Court: All right. Is there any redirect examination?

Mr. Pattishall: Yes. One or two questions. Please mark this for identification.

The Clerk: Plaintiff's Exhibit 14 marked for identification.

(The article referred to was marked Plaintiff's Exhibit No. 14 for identification.)

Redirect Examination

By Mr. Pattishall:

Q. Mr. Enfield, I refer your attention to a lamp sitting on the counsel table, the globe of which was just [129] broken. Is that the lamp that was used for the subject of the photograph which was used in the consumer test you testified to that we see in Exhibits 1, 11, 12, and 13?

A. Yes, sir, that is the same lamp.

Q. I show you another photograph marked Plaintiff's Exhibit No. 14 and ask you what it is, if you know.

A. This is a photograph of the window display

(Testimony of Robert E. Enfield.)

of the Globe Furniture Company on Washington, displaying these Sunbeam lamps in the window.

Q. Did they have the tags on them when you saw them?

A. Yes, they had the tags on them, and all of the tags were facing the window, so the street traffic could observe them.

Q. When did you last see them?

A. I think it was Thursday, but I am not sure. It was one day this week.

Q. This last week? A. Or last week.

Q. Did you have this photograph made (indicating)?

A. We called a photographer and had him go out——

Q. You say "we." What do you mean?

A. Mr. Christophersen and I called a photographer and had him go out and make it.

Q. Does this correspond to the window display you yourself saw (indicating)? [130] A. Yes.

Mr. Pattishall: I offer Plaintiff's Exhibit 14 in evidence as Plaintiff's Exhibit 14.

The Court: All right.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(The article referred to was marked Plaintiff's Exhibit No. 14 and was received in evidence.)

Q. (By Mr. Pattishall): Mr. Enfield, will you break down and supply tomorrow morning in this court percentages concerning the don't-know persons? A. Yes.

(Testimony of Robert E. Enfield.)

Q. I don't mean "don't know." I mean no purchases. A. Yes. Question No. 3.

The Court: I don't think it would be very revealing to me. I will tell you why. In going over the three books I notice that many of the persons who answer do not know or did not buy.

Mr. Pattishall: You think it speaks for itself?

The Court: Yes. If you broke it down you would have to make a very extensive breakdown. For instance, I notice some persons who say, "I never bought one," and then they will answer, nevertheless, and say they associated the product with Sunbeam. What category would you put them in? You would have to have too many rudiments.

The Witness: It would take an extensive breakdown. [131]

The Court: Unless for some reason you want it, I do not think——

Mr. Pattishall: I thought it might clear up the question.

The Court: I do not think it will clear up the question in counsel's mind. You can analyze it. They are right here. Each of those books have the 50 sheets. I can run through them. They are in the record. I can draw my own inferences.

Mr. Pattishall: Yes, sir.

The Court: I know some of them are answered very thoroughly and then the people refused to sign. They were on guard.

Mr. Pattishall: That is one point I would like to bring out.

(Testimony of Robert E. Enfield.)

Q. (By Mr. Pattishall): Mr. Enfield, did you instruct your interviewers to try to have the interviewees fill out the sheets themselves and get them to sign them?

A. Yes. That was the instruction.

Q. What was your experience or, rather, their experience in that connection?

A. Their experience was it was extremely difficult to get the people to fill out the questionnaires themselves. They run into the problem of finding people that had their hands full or were in some way tied up, and some of them didn't [132] want to make the effort to pick up a pencil and sign it.

The Court: In those cases I notice the interviewer marked "Filled out for respondent," or something like that.

The Witness: Yes. They were instructed to do that, and also to show the respondent the interview sheet and have them clear up any questions they may have had before the interview was ceased.

The Court: I am using that word, as you use it, "respondent." It is a very unusual twist to a word used among lawyers that have been using it for many hundreds of years. You call a man a respondent, an interviewee or respondent, the one that is interviewed. I guess, though, any man that responds would be a respondent.

Q. (By Mr. Pattishall): What instructions did you give to the photographer who made the photograph in Plaintiff's Exhibit 1, and also seen on the

(Testimony of Robert E. Enfield.)

covers of each of the three books, Exhibits 11, 12, and 13?

A. My instructions were that he was taking a picture to be used in a response test, and for him to pay particular attention to the label. I wanted it so that the label and the very fine print on the label could be read in the photograph. The photographer complied with this and took great pains to get it in a very sharp focus.

He also told me that he took it with a white light, without the use of a filter of any kind to change any of the [133] details.

Mr. Pattishall: That is this Exhibit 1, which also appears in the books.

The Court: All right.

Q. (By Mr. Pattishall): When you visited the Sunbeam Furniture Corporation display rooms, did you count the number of lamps which bore tags having Sunbeam on them on their floor?

A. Yes, sir.

Q. How many were there?

A. I counted 49 lamps bearing the Sunbeam tag and there were no lamps of any other description.

Mr. Pattishall: That is all.

Recross-Examination

By Mr. Beehler:

Q. Mr. Enfield, do you see all right without your glasses? A. Yes.

(Testimony of Robert E. Enfield.)

Q. I show you this lamp which we have introduced as the subject matter of your Exhibit No. 1, and I point the label toward you and ask you from where you sit—and to note for the record that the reporter is between you and me—can you read from there the name "Expert Lamp Company"?

A. Yes.

Mr. Beehler: That is all. [134]

The Court: That is on the label on the shade. Can you read it on the small label below, on the standard? Mr. Beehler: It isn't there.

The Witness: Since the globe has been broken, it doesn't hang down.

Mr. Pattishall: Here it is.

The Witness: No, I can't.

Mr. Beehler: Standing in the same position I was before, can you read it on the label of the lamp itself? The Witness: No.

Mr. Pattishall: The two labels are precisely identical in coloring and shape, are they not?

The Witness: Yes, in color and shape. But there is a difference in the lettering.

Mr. Beehler: And the lamp is never sold without the shade, either, is it?

The Witness: No.

Mr. Beehler: That is all.

The Court: All right.

(Witness excused.)

The Court: Mr. Beehler, I did not mean to intimate by my question it was not visible, but it

(Testimony of Robert E. Enfield.)

was that the field of vision would be taken by the splurge of Sunbeam itself. Unless you look especially to see the marking below, it would not be noticeable. I did not say it could not be seen. [135]

Mr. Beehler: I appreciate that. A part of our case is that we contend there is not a confusion of origin, because there is no mistaking the identity of the origin of anything that we sell, where anyone takes occasion to examine it in the light of circumstances.

The Court: I know what your theory is, but your practice is that you have a sun dial there, a big circular sign with a fancy L running through it. You have a circle there, about three inches by three inches. And right below in a small space, in a third of an inch space, you have in small type an identification. That is always the element, the visual element, which is very important in all these cases.

I remember years ago of a famous German trademark case. Heinrich-Frank-Sohne was a famous German trademark on a product that you do not see in this country, except in the South. It is chicory. That product is used all over Europe. It comes in a wooden box. They have a big label with Heinrich-Frank-Sohne on it.

One of the greatest infringement cases was in eastern Europe, where they relied on the fact that people did not understand the German language and they used three German words, Hoch, Feinste, Sort, meaning the highest quality. Imagine a Rumanian peasant knowing the difference between the

(Testimony of Robert E. Enfield.)

two, even if he could read the words. It shows how the pattern follows. [136]

A case I like to refer to is one up in my own home town, Modesto Creamery case. That was the case of Modesto Creamery vs. Stanislaus Creamery Company. The Stanislaus Creamery Company came in and tried to bank on the name that the Modesto Creamery had established, in the manufacture of butter. They called it Modesto butter. People that looked at the words on the package did not miss the word "Creamery." What they were impressed with was the word "Modesto." In all these trade-marks all over the world, the visual effect is of absolute importance. You can practice deception on it, merely by the manner in which you arrange your lettering on a piece of advertising. That is why I was calling attention to the difference between the size of the letters in which the words "Expert Lamp Company" appear, and the size of the letters on both labels on which the word "Sunbeam" appears.

Before you call another witness, we will have a short recess.

(Short recess taken.)

Mr. Pattishall: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 15 marked for identification.

(The article referred to was marked Plaintiff's Exhibit No. 15 for identification.)

Mr. Pattishall: Miss Trotman. [137]

JUNE LOUISE TROTMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: June Louise Trotman.

Mr. Pattishall: I have a couple of advertising sheets, your Honor, which read "Sunbeam Furniture Corporation, send them to Sunbeam," to which is clipped an identification card for use in sending retail customers to the Sunbeam show room, apparently to view and select merchandise.

Mr. Beehler here has agreed to stipulate these pieces are put out by the defendant Sunbeam Furniture Corporation.

Is that correct?

Mr. Beehler: That is correct.

Mr. Pattishall: I offer Plaintiff's Exhibit 15 for identification, which I have just described, into evidence as Plaintiff's Exhibit No. 15.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(The documents referred to were marked Plaintiff's Exhibit No. 15 and were received in evidence.)

(Testimony of June Louise Trotman)

Direct Examination

By Mr. Pattishall:

Q. Would you give me your full name, please?

A. June Louise Trotman.

Q. Where do you live, Miss Trotman?

A. 705 West 30th Street, Los Angeles.

Q. What is your occupation?

A. I am a student.

Q. Where are you a student?

A. At the University of Southern California.

Q. What year are you in at Southern Cal.?

A. Junior.

Q. What field are you studying?

A. Psychology and physics.

Q. What do you expect to take your degree in?

A. Either psychology or physics.

Q. Did you ever do any trademark research involving the word Sunbeam? A. Yes, I did.

Q. When was that?

A. The 7th and 8th of February.

Q. Where? A. In the Los Angeles area.

Q. Will you tell me, in your own words, what you did, please, briefly, what your instructions were? In other words, start at the beginning and tell me all about it.

A. I was hired by Mr. Enfield through the University of Southern California, to make a research survey. [139]

Q. Excuse me. When you said the 7th and 8th of February, is that this year, 1950?

(Testimony of June Louise Trotman)

A. This year, yes, sir. He gave us a set of instructions which we were to read and sign our names to, along with the date. That was the 7th. Then he took me to an area in Los Angeles and gave me 100 sheets of paper with questions on them and told me to ask—first, I was to show a picture of a lamp that was introduced a little bit ago, and to ask the people the three questions and have them fill it out, and to sign their name and address at the bottom.

Q. You say he supplied you with some material?

A. That is correct.

Q. I hand you Plaintiff's Exhibits 11, 12 and 13, and ask you to pick out the book that was supplied to you, if you can.

A. This one is mine (indicating). [140]

Q. Which one is that? Will you look at the number, please?

A. No. 13. He told us to show the picture first to the people and then to ask them these questions, have them filled out and sign their names.

Q. Are you referring to the sheets in the book?

A. The sheets in the book, yes, sir.

Q. Will you go on and tell me the story, please?

A. Well, I did as I was told. I asked the people the questions, and when they declined to sign their own name to it, I asked them to look it over carefully, see that I had filled in where they had indicated, and then I signed their name and affixed my initials to the side of that as it was filled out and

(Testimony of June Louise Trotman)

signed by me. Most of the time I could get them to sign it, but once in a while they didn't care to.

Q. Have you examined that book, your book, Plaintiff's Exhibit 13, today?

A. I did when I came in the court room, yes, I did.

Q. Did you examine it carefully enough to observe whether or not there were any alterations or removals? A. There has been none.

Q. What did you do with the books when you finished them?

A. I turned them in to Mr. Enfield.

Q. I mean the book. [141] A. This book.

Q. Yes, I mean "book" rather than "books."

A. I gave it to Mr. Enfield.

Q. What areas did you work in?

A. We worked in the areas stipulated here in the instruction sheets. Did you want me to read those?

Q. Just tell me generally what areas you worked in.

A. From Wilshire to Melrose, Highland to LaBrea, and Vernon to Slauson, Arlington to Fairfax.

Q. Did you know anything about this case or whom you were working for other than Mr. Enfield until you came to court today?

A. I didn't know anything until I came to court today about this case.

Q. When I talked to you yesterday, did I tell you anything about this case? A. No.

Q. Or rehearse your testimony which you have given here today? A. No, nothing.

(Testimony of June Louise Trotman)

The Court: The only notations that have been placed upon those sheets since they left your posession are those capital letters placed on the side of each by Mr. Enfield?

The Witness: The ones in ink?

The Court: Yes. [142]

The Witness: Yes, they were placed there since I returned the book.

Q. (By Mr. Pattishall): Other than that, that is the only alteration? A. That's all.

Mr. Pattishall: That is all.

The Court: All right.

Cross-Examination

By Mr. Beehler:

Q. Miss Trotman, when you made this survey, you defined the areas that you surveyed through, did you ring doorbells, did you call on residences, was that the way you did it?

A. That was part of it.

Q. How else did you pick the individuals that you questioned?

A. After we completed ringing doorbells we went to street corners, and I approached everyone I possibly could. As soon as I finished one sheet and put it underneath the sheet I had just finished, why, then, I asked the next person that came along. I didn't pick out any special people.

(Testimony of June Louise Trotman)

Q. Were there many who refused to give you answers at all?

A. I would say about three refused altogether.

Q. That is three out of——

A. They were in a hurry. [143]

Q. Three out of all of those that you asked?

A. Yes.

Q. And those three were three that you hailed on the street, were they?

A. About three on the street and about an equal number from door to door.

Q. I notice as I thumb through these pages, Miss Trotman, that almost every one appears to be a woman. Did you especially hail the women?

A. No, I didn't especially. Usually women came to the door. It was during the day hours, after 8:00 in the morning.

Q. Without my looking through here, do you remember about how many men you might have questioned?

A. Well, I could guess. It would be about five.

Q. Five out of how many? A. 100.

Q. Did you, Miss Trotman, make out one of these yourself before you started the survey?

A. Did I make one out?

Q. Yes.

A. Do you mean put my name and address down there at the bottom?

Q. Did you go through the questions and test yourself on the answers? [144] A. No.

(Testimony of June Louise Trotman)

Q. Do you mind if I ask you these questions?

A. I don't mind.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam"?

A. I have seen a picture of one.

Q. That was the picture at the survey?

A. Yes.

Q. That is the only one?

A. That is the only one.

Q. Do you know whether the company that makes the lamp makes any other product or products?

A. I don't, no.

Q. How much shopping do you do for your own household? A. All of it.

Q. Did you ever buy decorative lamps?

A. I have never bought a lamp.

Mr. Beehler: That is all.

Mr. Pattishall: No redirect.

Mr. Beehler, I have two other young ladies here in the court room who I believe would testify substantially the same; would you stipulate that they would testify substantially the same as to their books of exhibits?

Mr. Beehler: Yes. I would, though, like to ask them respectively a couple of questions. [145]

The Court: All right. They can be sworn. Call the next one.

Mr. Pattishall: May it be stipulated that their testimony on direct would be substantially the same as the witness Miss Trotman?

Mr. Beehler: That is satisfactory.

CLAUDEAN IVES

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Claudean Ives.

The Court: Miss Ives, you were one of the young ladies who did the research?

The Witness: That's right.

The Court: You heard the testimony given by Miss Trotman about the technique that she followed?

The Witness: Yes.

The Court: Did you follow the same technique?

The Witness: We were all given the same instructions.

The Court: Did you follow them?

The Witness: I didn't follow them exactly like she did, because I had my own way of interviewing.

The Court: But in substance the method of interview was the same? [146]

The Witness: Yes, because I didn't know any more about it than she did.

The Court: And your sheets—they are right in front of you, which number is it?

The Witness: This is it.

The Court: What number is it?

The Witness: 12.

(Testimony of Claudean Ives.)

The Court: Are those in the same condition in which you turned them over except for the ink capital letters marked on each?

The Witness: Only that I didn't follow instructions and insert a plain sheet where I had an omit, or a void, I guess I should have said.

The Court: All right. Go ahead.

Cross-Examination

By Mr. Beehler:

Q. Did I understand your name to be Cass?

A. Ives.

The Court: Ives, I-v-e-s.

Q. (By Mr. Beehler): Did you, Miss Ives, test yourself on one of these sheets?

A. No, I didn't.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam" other than the one that you used in this survey? A. No. [147]

Q. How much shopping do you do for your own household?

A. Well, all for my own personal use. I live in the sorority house.

Q. Before you left home did you ever do any for your own family? A. Oh, yes.

Q. Did you ever buy any decorative table lamps for the home? A. Yes.

Q. What did you personally look for when you went to buy a decorative table lamp?

(Testimony of Claudean Ives.)

A. The style that suited me mostly. I never looked at trade-marks.

The Court: You say you live at home?

The Witness: I live in a sorority house.

Q. (By Mr. Beehler): Among these 100 answer sheets which you have here, do you recall offhand about how many were men?

A. I believe I only approached two men.

Q. Two men out of 100?

A. Yes. Mostly because they were busy or had some business downtown, I didn't want to disturb them.

Q. On any of the 100 or so persons whom you approached, did you call their attention particularly to the label that appeared on the photograph? [148]

A. In a few instances I said, "Did this company make any other products?" and they would have to look closer, so I would point to the lamp and they would then look at the trade-mark.

Q. Did any of them remark about the name Expert Lamp Company, which appears on the photograph?

A. I don't recall. I had no knowledge of what the trade-mark meant at the time of the survey, and I don't recall.

Q. You never saw, actually, the lamp, either, did you? A. No, I know nothing about it.

Q. Only the photograph? A. Yes.

Mr. Beehler: That is all.

(Testimony of Claudean Ives.)

The Court: Any questions?

Mr. Pattishall: No.

The Court: Step aside; call your next witness.

Mr. Pattishall: Miss Algyer.

The same stipulation, Mr. Beehler?

Mr. Beehler: Yes. [149]

KATHRYN HELEN ALGYER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Kathryn Helen Algyer.

Mr. Beehler: Any questions, your Honor?

The Court: You are one of the young ladies in charge of this survey?

The Witness: I was helping with the survey, sir.

The Court: And you followed the same technique that the others followed?

The Witness: Yes, sir.

The Court: What is the number of your book, will you look at it?

The Witness: It is 11, sir.

The Court: You turned it over to Mr. Enfield?

The Witness: Yes.

The Court: It is in the same condition except for the letters marked in ink, the capital letters, is that true?

The Witness: That is true, sir.

The Court: All right. Go ahead.

(Testimony of Kathryn Helen Algyer.)

Cross-Examination

By Mr. Beehler:

Q. Miss Algyer, did you ever check yourself on this same questionnaire that you passed out to other people? [150] A. No, sir.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam" other than the one that you used for the purpose of the survey?

A. No, sir.

Q. You live at home now, do you?

A. Yes, sir.

Q. Do you do any shopping at all for your own household? A. Some of it, sir.

Q. Have you ever bought a decorative table lamp for your own use or household use?

A. Not that I can recall, sir.

Q. You have them in your home, do you?

A. Yes, sir.

Q. What is it that you consider important in the selection of a table lamp for your own home?

A. I don't know, sir.

Q. What are the things about a lamp that prompt you to buy one rather than another?

A. Quite frankly, sir, all I have ever purchased has been a study lamp, and that has been for light, and it has never occurred to me to try and merit a lamp as to how I would purchase it myself, because my mother, of course, does all that for our family. [151]

Q. Among the questionnaires which you sub-

(Testimony of Kathryn Helen Algyer.)

mitted here in this booklet, Plaintiff's Exhibit 11, about how many men signed their names or answered one of the questionnaires?

A. Five or six, sir.

Q. Five or six out of 100? A. Yes, sir.

Q. Did you make any special effort to ask women to answer, rather than men?

A. No, sir. Because when you go in shopping districts, they are mostly women, anyhow. 90 per cent of the shopping is done by women, and most housewives are women.

Q. Did you ever question any shopkeepers or sales persons along the lines that you questioned housewives? A. No, sir.

Q. You did, then, select persons, at least to that extent, by avoiding shopkeepers and sales persons?

A. It wasn't a question of avoiding them, sir; it was a question of their not being able to be at our disposal.

Q. Did your instructions include instructions not to question sales persons? A. No, sir.

Q. Can you tell us why you avoided the shops and stores, then?

The Court: As I gather it, it wasn't a question of avoiding them, she said they were just not on the list. [152]

The Witness: They just didn't come to us. We are not going to take the time to keep going in shops constantly. Besides they might not like it. They might not have the time.

Q. (By Mr. Beehler): Then that was a matter of election, is that it, that you didn't go into stores?

(Testimony of Kathryn Helen Algyer.)

A. What do you mean by "election"?

Q. A matter of choice on your part, is that it?

A. More or less, sir.

Mr. Beehler: That is all.

The Court: You said you never saw a lamp other than the picture. You have never seen a lamp which had the word "Sunbeam" on it?

The Witness: No, sir, except the one in this court room.

The Court: Does the word "Sunbeam" carry any meaning to you?

The Witness: Yes, sir.

The Court: What does it carry to you?

The Witness: Ever since I have been a little girl my mother has wanted a Sunbeam Mixmaster.

The Court: So long as counsel asked you the first question, supposing I asked you, "Does the company Sunbeam make any other products?" what would your answer be?

The Witness: Well, yes, sir, because I know now, sir. [153] After having surveyed all these people, we hear about the toasters and shavers.

The Court: But you knew about the Mixmaster before you interviewed these people?

The Witness: Yes, sir.

The Court: All right.

Mr. Pattishall: Your Honor, my case in chief will be complete as soon as I have put in a reaction test that was taken two years ago at the same time the reaction test was taken which we introduced in the lighting case. It was taken the same days by different people. It was much more extensive

(Testimony of Kathryn Helen Algyer.)

than this one. It is very interesting, I believe I can comment, that the percentage in that one of confusion was 51 per cent, and in this one it was 56 per cent. Why, I don't know. However, there was a close correlation.

The Court: All right.

Mr. Pattishall: I think I can get that in pretty quickly.

Mr. Lampa, take the stand. [154]

HOWARD L. LAMPA

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Howard L. Lampa.

Direct Examination

By Mr. Pattishall:

Q. Give me your full name, sir.

A. Howard L. Lampa.

Q. Where do you live?

A. 419 Ellis Avenue, Wheaton, Illinois.

Q. What is your occupation?

A. Trade-mark research.

Q. How long have you been so engaged?

A. Approximately 19 years.

Q. What is the nature of your work in that field, briefly?

A. I was working generally with attorneys acquiring evidence of the secondary meaning of trade-

(Testimony of Howard L. Lampa.)

marks and developing confusion or the likelihood of confusion in connection with trade-marks.

Q. Have you ever done any research in connection with the word "Sunbeam"?

A. Yes, sir, I have.

Q. When was that? [155]

A. March and April, 1948.

Q. Where? A. In Los Angeles.

Q. By whom were you employed to do this research? A. Sunbeam Corporation.

Q. What was your assignment?

A. To make a survey in Los Angeles to determine whether middle income groups would on seeing a lamp bearing the trade-mark "Sunbeam" associate it with the Sunbeam Corporation or products put out by the Sunbeam Corporation.

Q. Will you tell us what you did to carry out this assignment?

A. Yes. We first purchased a lamp bearing the trade-mark "Sunbeam" and had it photographed. I then got up a questionnaire and after that I went to the Los Angeles Real Estate Board and had them mark out five areas in Los Angeles which they would classify as middle income neighborhoods. I then employed three girls and instructed them to go to homes in these areas and show them a photograph of the lamp and ask them questions which were on a questionnaire form.

The Clerk: Plaintiff's Exhibits 16, 17 and 18 marked for identification.

Q. (By Mr. Pattishall): Mr. Lampa, I show you Plaintiff's Exhibits 16, 17 and 18 for identifi-

(Testimony of Howard L. Lampa.)

cation, and ask if you will tell me what they [156] are.

A. Plaintiff's Exhibit 16 is the questionnaire sheet which I got up and which the girls used. There were 1500 interviews. Plaintiff's Exhibit——

Q. How many interviews?

A. 1500. Plaintiff's Exhibit 17 is the photograph of a lamp bearing the trade-mark "Sunbeam" which was used in the survey. And Plaintiff's Exhibit 18 is a copy of instructions which I gave to Mrs. Still, Mrs. Sahl and Mrs. Sapp.

Q. Will you proceed with your story?

A. During the latter part of March and the early part of April the girls went into these areas, and as they completed the survey, completed each book of 50 interviews——

Q. Excuse me. Did you mention what areas?

A. There were five areas. Area 1 was from Crenshaw Street to Western, to Manchester to Florence; area 2 was Avalon to Central, and Manchester to Florence; area 3 was Beverly to Melrose, Larchmont to Western; area 4 was the Metropolitan housing project; area 5 was Ferguson to Whittier, and Atlantic to Concourse. All during the time the girls were making the survey I appeared in the territory with them every day, at times walked down the street with them, was able to hear them making interviews and observe what they were doing. I kept a very strict watch on the survey and how it progressed. And as they finished each book of 50 sheets, [157] those sheets were then turned over to me for tabulation.

(Testimony of Howard L. Lampa.)

Q. How would you tabulate them?

A. The tabulation showed that there were, out of 1500, 766 persons who on seeing this photograph associated it with products of the Sunbeam Corporation, which is approximately 51 per cent of all the persons interviewed, therefore, that were confused.

Q. Why did you decide to stop at 1500?

A. We figured 1500 interviews for one city was sufficiently large and covered a good portion of the type of people we wanted to interview.

Q. Did you make a tabulation at lower figures? Did you ever reach any point of uniformity?

A. Yes; as the survey progressed the figures became more and more uniform. In other words, by tabulating by books the figures became more uniform.

Q. Do you happen to have the breakdowns on those figures?

A. No, sir, I don't have those figures.

Q. But you did make them at the time?

A. I did make them, but I don't have them now.

Mr. Pattishall: I hate to burden the record with this material, your Honor, but these are the original sheets.

The Court: You don't need to. You may just identify them and have him give the summaries, and that is sufficient [158] compliance with the rule in this Circuit. The originals are available. He can give us the computation from them, and if counsel wants them, they can examine them. There is no use to put that kind of a record in.

There is an alternative. On any record on appeal,

(Testimony of Howard L. Lampa.)
you will either have to send them up as they are or do an awful lot of printing.

Mr. Pattishall: Mark them for identification.

The Clerk: Is it actually necessary to physically mark them for identification, your Honor?

The Court: Yes, I think you had better mark it for identification, one of them, and put a tag on the group, and then if you withdraw them, put one in as a sample.

The Clerk: Plaintiff's Exhibits 19, 20 and 21, marked for identification.

(The documents referred to were marked for identification Plaintiff's Exhibits 19, 20 and 21.) [159]

Q. I call your attention to Plaintiff's Exhibits 17 and 18. Have you testified to those before?

A. Yes, I have.

Mr. Pattishall: I offer Plaintiff's Exhibits 16, 17, and 18 for identification into evidence as Plaintiff's Exhibits 16, 17, and 18.

The Court: All right. They may be received.

The Clerk: Plaintiff's Exhibits 16, 17, and 18 received in evidence.

(The documents referred to, previously marked Plaintiff's Exhibits 16, 17, and 18 for identification, were received in evidence.)

Q. (By Mr. Pattishall): Mr. Lampa, there are before you Plaintiff's Exhibits 19, 20, and 21, which are batches of notebooks. Have you examined those notebooks? A. Yes, I have.

(Testimony of Howard L. Lampa.)

Q. Where have they been during the past two years?

A. They have been in our office in Chicago, until the time they were brought here to California for the trial.

Q. Have they been in any way altered since they have been filled out by the interviewers which you mentioned?

A. None, except on the margin of the right-hand margin of the sheets I would put down some letters which were my code letters for tabulating. Outside of that, there have been no alterations whatsoever on these sheets. [160]

Q. Will you explain what your code was?

A. Under Question 1 there are four classifications, persons who have bought the lamp, seen the lamp, have never seen the lamp, and don't know. So we would just put on the margin a B and S and N or a D, depending on how the question was answered.

Now, in Question 2, on the margin, we would indicate either a B, S, N, or D, whether they bought, seen, or never saw, or didn't know.

Another letter would follow that which would indicate whether or not the person was confused, possibly not confused, and an indefinite classification. By an indefinite classification I mean where we would ask a question and they would probably come back and ask, "Is that the company that makes the iron?" We would not classify that as a confusion; we would put it in an indefinite classification.

(Testimony of Howard L. Lampa.)

The only confusion we would list is where people very definitely came out and said, "Yes, I have a Mixmaster," or, "I have an iron," or indicate products.

Question 3, we would use the initials M, H, L, or N, for most, half, little, or none. That is in connection with how much shopping they do for the household. And below this we would have either O-40 or U-40. That would mean they were under 40 or over 40.

Under that normally would be the initial M or F, [161] indicating whether it was a male or female, the person interviewed.

Q. Are you familiar with the test conducted by Mr. Enfield? A. Yes, I am.

Q. What is the difference between this test and the one conducted by Mr. Enfield?

A. I believe on this test we had 51 per cent. Mr. Enfield's test was 56.3 per cent confusion.

Q. I mean, was there any difference in the survey sheet or in the manner in which the tests were conducted?

A. I believe the survey sheet was identical, except for the information at the top. I don't believe they had the age or sex classifications at the bottom.

We did not make any attempt to have a person fill in the sheet themselves. We filled the sheet in ourselves and handed the book to the person being interviewed and asked them to sign it. If they refused to sign it, we would then ask their name and address and put it in ourselves, or, rather, the girls would, I should say.

(Testimony of Howard L. Lampa.)

Q. Of course, the photograph of the lamp was a different lamp which bore the trade-mark Sunbeam?

A. Yes, the photograph was a different photograph.

Mr. Pattishall: That is all. [162]

Cross-Examination

By Mr. Beehler:

Q. Mr. Lampa, among the 1,500 interviews which you reported upon, not one of those persons was shown an actual lamp, were they?

A. No, sir.

Q. Not one of those persons was shown one of the labels which was attached to the lamp that you took a photograph of? A. No, sir.

Q. Mr. Lampa, you have made a great many surveys of various kinds?

A. Well, I have made quite a few.

Q. You have a substantial amount of experience in picking questions to produce results?

A. Well, we have designed quite a few survey sheets, yes.

Q. Can you tell me, Mr. Lampa, what prompts you to show a photograph of a lamp, such as this (indicating), and to leave out of the picture all environment? Why do you just show the lamp by itself? A. Why did I show it all by itself?

Q. Yes.

A. I thought it would be clearer and less con-

(Testimony of Howard L. Lampa.)
fusing to the person being interviewed. If you had other objects [163] in there, their eyes might wander or their minds might wander.

Q. It is true you could have framed questions in connection with the Sunbeam lamp which would have produced an altogether different percentage result than the way it turned out?

A. Not and still have it undetected.

The Court: He wants to know if you could slant the questions——

The Witness: It could be done. Anyone familiar with surveys could have detected it very rapidly, though.

Q. (By Mr. Beehler): I show you a picture here, Mr. Lampa, in Furniture Field, February, 1949, which I will introduce for identification as Defendants' Exhibit C.

The Clerk: Defendants' Exhibit C marked for identification.

(The document referred to was marked Defendants' Exhibit C for identification.)

Mr. Beehler: That is, page 12.

Q. (By Mr. Beehler): I call your attention to a decorative table lamp on a table or stand of some kind, sitting between two pieces of upholstered furniture.

Is it not true that if you showed a picture of a Sunbeam lamp in that sort of an environment you would get an altogether different percentage in your answers?

(Testimony of Howard L. Lampa.)

A. No, I don't think that is true. The people were [164] able to see the name of Sunbeam on there; if they were, I don't believe it would change the results.

Q. Did you ever run a survey for furniture in connection with Sunbeam? A. No, sir.

Q. Furniture of any kind? A. No, sir.

Mr. Beehler: If I may, I would like to hold that for introduction until tomorrow. I have a number of other things I want to introduce in connection with it.

The Court: That is all right. You do not have to offer it now. You can do that tomorrow as part of your case.

Q. (By Mr. Beehler): Is it not true, Mr. Lampa, that you could frame questions and accompany them with a picture of a different sort, in order to get a different result in a survey of this kind?

A. I don't quite understand what you mean. Are you talking about the picture or the questions, now, or both?

Q. In combination.

A. Well, I believe it would be possible, as I said before, to slant a survey, but I don't believe it is possible to do so without it being detected by somebody that knows something about surveys.

The Court: In other words, you could frame your questions so that they would know what you are aiming at? [165]

The Witness: Yes, you could put in leading questions and suggestive ones. You could do that.

(Testimony of Howard L. Lampa.)

The Court: You could put in questions, such as the type we have asked here: What does the word "Sunbeam" spell out? And you would get a much more favorable reaction than the question you had as to what other objects the concern makes.

The Witness: That is right.

Q. By Mr. Beehler): You have been in lamp departments in stores, have you not?

A. Oh, yes.

Q. You know in those lamp departments there are virtually hundreds of different styles, varieties, and colors of lamps?

A. There are some stores, sure.

Q. Wouldn't you get a much more accurate survey, much more accurate picture, if you would show to the person answering the questions lamps in the environment of which they would purchase them as purchasers?

A. You say "more accurate"?

Q. More accurate. A. I don't believe so.

Q. When a person buys a lamp he usually looks at more than one lamp?

A. They look at one lamp at a time. I don't think they stand off at a distance and look at a hundred lamps. [166] Normally, they examine each lamp.

Q. They look at a number of different lamps before they make a selection.

A. I would assume so, yes.

Q. In your survey you showed them just one lamp? A. That is right.

(Testimony of Howard L. Lampa.)

The Court: You were not testing them as to whether they would like to buy this lamp or whether they preferred it?

The Witness: No, sir.

The Court: You were not asking them what they would do if they were in the market to buy one?

The Witness: That is right.

The Court: You were merely asking them whether it had any meaning to them?

The Witness: Yes.

The Court: Whether they knew the company that manufactured it?

The Witness: Yes.

The Court: Whether they had ever bought one or whether the company made other products?

The Witness: Yes.

The Court: I think it would be conceded that many people, in buying a lamp, would want to look at the shape of the lamp and its contour and coloring and so forth. That does not detract from the fact that a person buying a lamp, other [167] things being equal, and being told it was Sunbeam, would think it was made by the defendant.

Q. (By Mr. Beehler): Before you framed your questions, Mr. Lampa, did you make any investigation of the buying habits of people that bought lamps? A. No, sir.

Q. Then, when you framed your questions you had no idea of what a housewife looks for when she goes to buy a lamp?

(Testimony of Howard L. Lampa.)

A. Other than having been in a store with my own wife when she was looking for lamps.

Q. So that the set of questions and circumstances set up in your questionnaire are really distorted, are they not, from what would naturally take place when a person buys a lamp?

A. Well, we weren't selling lamps.

The Court: You were not investigating the lamp-buying habits of the people?

The Witness: That is right.

The Court: I think it is an argumentative question. It is quite evident what they were trying to show is what the words on a product meant, not the buying habits of the people who bought lamps.

Q. (By Mr. Beehler): Among the fifteen hundred or so persons who answered your questions, were any of them shopkeepers, sales persons? [168]

A. I don't know. They were interviewed at their homes. I assume that the women, particularly, they are housewives.

Q. The survey then was directed solely to persons in their homes?

A. Yes. I believe on a few occasions they might stop a person walking down the street. We did not interview people on street corners, normally.

Q. You have never interviewed people in shops?

A. No.

Q. And particularly you never interviewed anyone in a lamp shop? A. That is right.

Mr. Beehler: That is all.

(Testimony of Howard L. Lampa.)

The Court: All right. Is there any redirect examination?

Mr. Pattishall: No, sir.

The Court: Step down.

(Witness excused.)

Mr. Pattishall: Mrs. Sahl.

BEVERLY SAHL

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Beverly Sahl. [169]

Direct Examination

By Mr. Pattishall:

Q. Would you give me your full name, please?

A. Beverly Sahl.

Q. Where do you live?

A. 1428 West 59th Street, Los Angeles.

Q. What is your occupation?

A. Housewife.

Q. Did you ever do any trade-mark research work involving the word "Sunbeam"?

A. Yes, I did.

Q. When?

A. In the latter part of March and the early part of April of '48.

Q. Where was it?

A. In the Los Angeles area.

(Testimony of Beverly Sahl.)

Q. Will you tell me in your own words, as briefly as possible, what you did and what your instructions were?

A. Well, I went to the Dunn and Dunn Agency, to get a job. They told me that they didn't have anything, only just a temporary job at the time, and I told them I would take it.

They told me it was in survey work. That I could contact Mr. Lampa at the Clark Hotel, which I did. He gave me written instructions, with a survey sheet, and I followed the instructions. [170]

Q. Those instructions correspond to Plaintiff's Exhibit 18? Will you look at it, please?

A. That is right.

Q. Tell me in a little more detail what work you did when you commenced this job?

A. Well, we were assigned a survey sheet and we went out to the areas we were assigned to.

I went up to their homes and called on the housewives, and I asked them the questions that were given to me on the survey sheets.

I wrote down just what they answered, and I asked them to sign their names.

When I finished with the survey sheet I turned it over to Mr. Lampa. If they didn't sign their names I asked them to give me their name and they gave me their name, and I wrote it down myself.

Q. Have you examined any of the books piled up in front of you which are marked for identifi-

(Testimony of Beverly Sahl.)

cation as Plaintiff's Exhibits 19, 20 and 21?

A. Well, I looked at them before I came on the stand and——

Q. Today, in the court room? A. Yes, sir.

Q. Did you look through them carefully?

A. Yes, I did. [171]

Q. Which pile is yours?

A. The gray books, with the exception of two, I believe, were blue.

Q. Had there been any alterations or removals that you can observe?

A. There hasn't been any removals or alterations, except the green letters at the right-hand side.

Q. Do the books in Plaintiff's Exhibit 20 comprise the whole of your work?

A. Just what do you mean by that?

Q. That is all that you did for Mr. Lampa?

A. Well, I presume it was. I mean, I turned in all my books. I gave them to him. It was about 600 people that I interviewed.

The Court: How long did it take you?

The Witness: Oh, we were on the job about three weeks, but with the exception that there were some days it was raining and we couldn't work.

The Court: How many could you do in a day?

The Witness: Well, we tried to do around 50.

The Court: All right.

Mr. Pattishall: I think that is all.

The Court: Cross-examination.

(Testimony of Beverly Sahl.)

Cross-Examination

By Mr. Beehler:

Q. Mrs. Sahl, I notice you are a housewife, in addition [172] to having worked on this survey?

Have you, Mrs. Sahl, ever purchased lamps for your own house?

A. Other than floor lamps, no.

Q. What kind of furniture do you have in your house, what period of furniture?

A. Well, I would just say the ordinary furniture for any home.

Q. Do you make any attempt to have the lamps in your home conform with the kind of furniture you have? A. Well, no, I don't.

Q. Do you know what trade-marks are on the lamps that you have in your house?

A. No, I don't.

Mr. Beehler: That is all.

The Court: I want to ask you one question, Mrs. Sahl. Before you did this survey work, what meaning did the word "Sunbeam" have for you, before you began the survey, if you can put yourself back before you were employed to do this survey work?

The Witness: Well, my husband has a Sunbeam Shavemaster and I also have a Sunbeam waffle iron.

The Court: You had that before?

The Witness: Yes.

The Court: If you had been asked the question,

(Testimony of Beverly Sahl.)

as to [173] what products, or if you had been interviewed and shown this lamp and been asked what other products the Sunbeam Company manufactures, what would your answers have been, before you were employed on this survey work?

The Witness: You mean other than the lamps?

The Court: Yes. If you had been asked that question No. 2 before you began the survey, what would you have answered?

The Witness: I would have said they made a Shavemaster, the Mixmaster and the Coffeemaster.

The Court: All right.

(Witness excused.)

Mr. Pattishall: Mr. Beehler, will you stipulate that Mrs. Still's testimony on direct would be substantially the same as Mrs. Sahl's, with respect to her books?

Mr. Beehler: So stipulated.

JACKIE JEAN STILL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jackie Jean Still.

The Court: Let me ask one or two leading questions. You took part in this survey?

The Witness: Yes, I did. [174]

The Court: And you followed the same pro-

(Testimony of Jackie Jean Still.)

cedure as the witness preceding you, who testified?

The Witness: Yes.

The Court: You turned the books over, and you have looked at them since you turned them over?

The Witness: No, I haven't.

The Court: Take a look at some of them and see if any relate to yourself.

The Witness: These are mine (indicating).

The Court: Those are yours?

The Witness: Yes.

The Court: Are they in the same condition as when you turned them in?

The Witness: They look like they are, except these——

The Court: The lettering on the side?

The Witness: Yes.

The Court: Which is a means of identifying them?

The Witness: Yes.

The Court: All right. Go ahead.

Cross-Examination

By Mr. Beehler:

Q. Mrs. Still, are you a housewife?

A. No, I am not.

Q. What sort of premises do you live in? An apartment? A. Yes. [175]

Q. Do you have a family? A. Yes.

Q. Do you have lights in your apartment?

A. Yes.

(Testimony of Jackie Jean Still.)

Q. Are there table lamps?

A. No. I have a floor lamp.

Q. What trade-marks, if any, are there on those floor lamps? A. I don't know.

Q. You don't know?

A. No. I never looked.

Q. Did you know when you bought them?

A. I didn't buy it. My apartment is furnished.

Q. Since making this survey, have you taken occasion to look to see what trade-mark is on the lamp in your own house? A. No.

Mr. Beehler: That is all.

The Court: Before you made this survey, did you hear the word "Sunbeam"?

The Witness: Yes.

The Court: In what connection did you hear it?

The Witness: My sister has a Sunbeam Mixmaster and my mother also had one, and I had heard of the other products.

The Court: Now, before you worked on this survey, if [176] you had been asked if the Sunbeam Company produced other products than the lamp as represented in the picture, what would your answer have been?

The Witness: Well, I would probably have said yes.

The Court: What would you have named?

The Witness: Sunbeam Mixmaster and Coffeemaster, toaster.

The Court: I gather no one in your family uses an electric razor?

(Testimony of Jackie Jean Still.)

The Witness: They used to.

Q. (By Mr. Beehler): You mentioned Mixmasters and these other products. Is it also your impression that the Sunbeam Corporation makes a Toastmaster?

A. Well, they make the toaster or the Toastmaster. I know it is one of the two.

Mr. Beehler: That is all.

Mr. Pattishall: Which group of books was yours?

The Witness: These (indicating).

Mr. Pattishall: That is Plaintiff's Exhibit 21 for identification?

The Witness: Yes.

The Court: All right.

(Witness excused.)

Mr. Pattishall: Your Honor, we had one more interviewer who participated in this test, but who has moved to Oklahoma. If necessary, we will send for her. [177]

The Court: I think the evidence in the record shows the technique has been followed.

Mr. Beehler: I have no objection, your Honor.

The Court: I am not going to penalize you in any manner or draw any inference from the fact that you don't have the other witness.

Mr. Pattishall: The plaintiff rests, your [178] Honor.

The Court: Gentlemen, it is near adjourning time, and we have reached a good stopping point.

We have made good progress and there is no need keeping longer hours than we have already.

We will continue the matter until tomorrow morning at 10:00 o'clock. There will be no interruption in the morning. We will proceed right on time, because this is the only case. This case has priority until Thursday, at which time I hope we will be through. If not, you still have priority.

Mr. Beehler: We anticipate, your Honor, we will certainly take no longer than tomorrow and possibly not all day.

The Court: I will cut down the lunch hour probably more, if it looks as though we might not finish, because this other case is a jury trial and I have a jury I called for Thursday morning. Of course, if we are not through we will just have the jury wait, and excuse them.

As I say, I do not want to curtail you in any way in the presentation of your testimony. There is only one question I might bring up at this time. I have not referred to it before. It is a question that came up in the other suit, a question which has been coming up in this circuit repeatedly.

I take the law to be that if the evidence does not show that there is a confusion of source or likelihood of confusion of source, it does not make any difference, that the field is entirely different. Nor does it make any difference that [179] the product is different.

You seem to stress a good deal on the proposition that the plaintiff does not manufacture lamps, Mr. Beehler. So there will be an understanding about

my possible ruling, I take the view it does not make any difference.

It is true that some of the cases we discussed this morning, such as the Brooks case and the Stork Club case and the Safeway case and the other late cases, the Maternity Lane case, and one case that was not mentioned, the Lerner Stores case, that there was an element there of similarity in the field.

While a saloon on Market Street in San Francisco is not the Stork Club, they do sell drinks, and under the California law they must sell food along with the drinks. As I view the law, it does not make a bit of difference, if there is likelihood of confusion. The best illustration we have in this circuit is the decision of our own circuit in the Del Monte brand case. In that case the court was confronted with the argument that the man was using Del Monte in conjunction with margarin. Del Monte Canning Company was not producing margarin. There was no showing they ever intended to produce margarin, and yet Judge Wilbur, who, as you know, had a long career on the bench of California, beginning as a judge of the Superior Court of this County—I tried my first case as a lawyer in this county before him, but not as a lawyer [180] in the State—made it very emphatic it did not make a bit of difference.

In anticipation of the defense, I want to state my understanding of the law. If you know anything that has changed this law, I will be very glad to have you call it to my attention.

This principle applies both to trade-mark in-

fringement and also unfair competition. I will point out in a moment how the courts of California in the very latest cases on the subject have taken this statement I am about to read and made it applicable to the law of unfair competition. The law of unfair competition at the present time is governed by state law. Fortunately, the law of unfair competition of California is identical with what the general law has been in the federal courts.

I am reading from Del Monte Special Food Co. v. California Packing Corporation, 34 Fed. (2d) 774. I am reading from page 775:

> "The contention of the appellant is that, inasmuch as the appellee has not produced, and does not now produce, oleomargarine or use its label thereon, it is not and cannot be damaged by the use of 'Del Monte Brand' upon the oleomargarine marketed by the appellant. The injury to the appellee by the use of the Del Monte Brand by the appellant does not [181] result from preventing sale by appellee of oleomargarine of its own, but from a representation to the public that it produces a product which it does not in fact produce and over which it does not in fact produce and over which it has no control. Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production. Thus every effort made by the appellee to increase the volume and variety of

> its products and maintain its high standard of quality by its systematic and expensive advertising campaign and by care in the preparation of its products redound to the benefit of the appellant, which does not contribute in any manner to the expenditures involved in this vast undertaking, and whose only motive for the adoption of the same 'brand' is to get the advantage of appellee's name, reputation, and good will. The law of unfair competition has resulted from the application of a simple proposition to the extension and modern development of manufacturing and merchandising. That principle may be expressed in the language used by the various [182] courts when dealing with the subject of unfair competition, as follows: 'That nobody has any right to represent his goods as the goods of somebody else.' "

Then they go on and cite from Judge Learned Hand's famous statement in Yale Electric Corporation, and they cite the Aunt Jemima case and the Akron-Overland case, and other cases.

The courts of California have followed this principle. One of the latest cases is a very long case, California Prune Association v. H. R. Nicholson Company, decided in 1945, 69 Cal. App. (2d) 207. The opinion is written by Judge Sturtevant. That was the famous case involving the Sunsweet prunes. The man used the word "Sunsweet" in connection with a portion of his name, "Nicholson" and called it "Nicholson's Sunsweet." The court held that it was both infringement of trade-mark and unfair

competition. In that case they refer to the identical argument that was made in the Del Monte case. After distinguishing the Washburn and Gold Medal Flour case, this is what they say:

> "The distinctions made by the defendant are not sound. The correct test to be applied was stated in Sun-Maid Raisin Growers v. Mosesian. In that case the court said: 'The authorities are fairly uniform to the effect that it is not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be [184] deceived by the imitation of a trade-mark.' "

Then they quoted the identical paragraph which I read from the Del Monte case ending with the words that I read, "That nobody has any right to represent his goods as the goods of somebody else." Then they go on and also hold that the mere fact that the registration may have been under a different classification does not affect the ultimate result.

The later case is in 79 Cal. App. (2d), decided in 1947, and that is the Physicians Electric Service Corporation against Adams. That is the electronic case, as we call it. In that case a man used the name called Physicians Electronic Corporation, and the court held there was infringement. It is interesting to note that in both of these cases the courts held that whether you look at it from the standpoint of trade-mark or you look at it from the standpoint of unfair competition, the result is the same.

They also refer to the Rosenthal case, where a man ran a store called the Family Shoe Store, and they held that a man couldn't put his name in front of that and call his Rosenthal's Family Shoe Store. Here is a point. I am reading from the Nicholson case, page 219:

> "Addressing ourselves to the first count of Plaintiff's complaint pleading infringement of trade-marks, it was not necessary that the [185] plaintiff should prove actual confusion of goods."

Then they cite the Del Monte case and another case.

> "Addressing ourselves to the second count of plaintiff's complaint pleading unfair competition, the rule is the same."

So that in all these cases it is the likelihood of confusion from similarity that is the test and not actual confusion.

I thought I would point that principle out to you so that we would have an understanding as to what I consider the law of California to be on the unfair competition angle. And, of course, we all concede that the law of this district, so far as the trade-mark angle is concerned, has been settled in the last three three or four years in the cases that we all know, and which give us all phases of this question.

Mr. Beehler: May I have the page citation in 79 Cal. (2d)?

The Court: It is page 550, Physicians Electric Service Corporation against Adams.

So long as we are talking about that case, here is the paragraph I was looking for and couldn't find. When you are in a hurry you never can find them.

On page 551:

> "It is sufficient to enjoin the use of [186] such names by competing businesses if the imitation name tends to deceive customers and injures plaintiff's business."

In other words, it is the tendency, and that is a question of fact to be determined by the court, whether there is likelihood.

All right. Tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:05 o'clock p.m., Tuesday, February 14, 1950, an adjournment was taken until 10:00 o'clock a.m., Wednesday, February 15, 1950.) [187]

* * *

Mr. Pattishall: Your Honor, we believe that we have proved all of the essentials of our case, both as to unfair [279] competition and as to trade-mark infringement. We feel that we have proved our ownership and use, our widespread advertising, our 21 years priority; that we are known as "Sunbeam" and have been known as "Sunbeam" for many, many years in the past. We have proved the secondary meaning of our trade-mark by the testimony of dealers and consumers. We have proved actual confusion, principally by the testimony of Mr. Garriott, between ourselves and the defendants. We have proved, we believe, the likeli-

hood of confusion by two unimpeachable surveys taken two years apart, which came out with very closely corresponding results. We feel that the defendants' own exhibits demonstrate their usage, and that those exhibits speak for themselves.

As to the infringement aspects, I believe the law is clear that middlemen are as liable as anyone else. I have covered that somewhat in my memorandum trial brief. I think the Restatement puts it very clearly, the Restatement of the Law of Torts.

As for the unfair competition aspects of the case, I think your Honor summarized that completely last night. The Brooks case, the Safeway case, the Stork case, the Del Monte case, and a host of others all demonstrate and hold that the actions of the defendant in this case constitute an unfair practice, and that they are liable accordingly.

We ask that they be enjoined so that our identity may be [280] protected. We ask for little else. As I did before, I waive damages. I think, actually, under the doctrine of the Brooks case we are not entitled to an accounting and damages, because we didn't sue early enough. It is spelled out very clearly, I think, in the last five pages of your Honor's decision. I can't argue contrarywise.

As I have said before, all we seek here, sir, is a shield, not a sword.

The Court: All right. Mr. Beehler.

Mr. Beehler: There appear to be two questions which need to be resolved. One is whether or not there is trade-mark infringement by the actual defendant in this case, and the other is whether or

not there has been unfair competition on the part of the defendant in this case.

Your Honor has referred to a number of decisions as bearing upon the point. Your Honor is well familiar with the trade-mark law in that respect. We have, then, to apply the facts in this case to the law as it is laid down in those other cases on sets of facts which were pertinent particularly to those cases.

In this case we contend, contrary to the plaintiff, that there has been no actual confusion proved. It is true that one witness, Garriott, cited a single instance where he purported to say that an indignant customer had become provoked because he did not carry the Sunbeam lamp. [281]

It was sektchy testimony, not at all conclusive.

One of the plaintiff's witnesses, a paid investigator, Gibson, attempted to show that some retail dealer, or other, unconnected in any way with any party here had supposed that the Sunbeam Mixmaster Company was maybe the same one who made a certain Sunbeam lamp. Those are the only proofs offered of actual confusion on the part of the plaintiff.

Plaintiff's own witness, Mr. Wallick, who had handled their line for 18 years, and who had handled lamps, as well, could cite no instance of confusion in his shop in 18 years.

No other actual instances of confusion have been brought before the court.

To substitute for actual confusion the plaintiff has brought here surveys, surveys carried on by

paid survey companies. They set up their own questionnaires. They were hired by the plaintiff to produce certain results. The surveys are sketchy as to questions. The questions are selected for a certain purpose, and they do not question the interviewers under circumstances which parallel the circumstances where any one of those interviewers would purchase either an appliance or lamp. They were door-to-door canvassers, street corner canvassers, and they questioned 95 per cent women, about 95 per cent housewives.

Even in the most recent survey there were 300 persons questioned, and only two persons out of 300 ever bought a [282] Sunbeam lamp. Only 22 out of 300 ever thought they saw a Sunbeam lamp. And still the questionnaires are phrased to suggest that there are other products possibly made by the Sunbeam Corporation, other than the Sunbeam appliances with which we are all familiar.

Throughout the plaintiff's testimony, almost without exception when the witness was asked what does the Sunbeam Company make, or words to that effect, the first phrase that came to their mouth was the Sunbeam Mixmaster, and then followed a few of their other items in some scattered instances. Without exception, every one of them associated appliances with the name "Sunbeam."

On the other side of that particular point we have had an abundance of testimony by our own witnesses, and the plaintiff's witnesses, to the effect that appliances and household furnishings are dif-

ferent things, they are sold in different ways, they are sold in different stores, they are sold in different departments of the same store, if it be a large one, and they cater to a different customer demand.

Now, it is true that there is an electric plug, a socket and cord. There isn't any bulb in the lamp that we saw, just a socket, cord and plug. The only thing electrical that the defendant here is concerned with is a cord, socket and plug. As far as the lamp itself is concerned, it is [283] purely and simply a decorative element.

The strength of a case which demands relief for unfair competition must have a certain number of factual elements in it. While it may be true that in this Circuit there need not be market competition, and while it may be true that there need not be, perhaps, actual competition between goods, on the other hand there must be some element there which relates the defendants' goods to the plaintiff's goods, or relates the plaintiff's good will to the defendants' good will. There must be some relation between the two.

Now, cases have been cited by your Honor in connection with the law in California with regard to unfair competition, and I would just like to dwell very briefly on the subject-matter of those cases, because I feel that they do not have a parallel in the facts before us here.

In the Modesto Creamery case the goods were identical. It was butter in both instances. In the Sun-Maid Raisin the goods were identical in both instances, it was raisins. In the Wood v. Peffer

case, the goods were identical, they were refrigerators. In the Winfield v. Charles case actual confusion was proved, letters written to one concern got to the other, letters written to the other concern got back to the one concern.

Now, with respect to the Del Monte case, in that case although the goods were not identical, oleomargarine not having [284] been sold previously by the California Packing Company, nevertheless it was a grocery item sold in grocery stores in almost every instance, and the plaintiff had been selling grocery goods in the same stores for years. Even there, there was actual confusion proved in accordance with the evidence.

In the case of California Prune v. Nicholson, again the goods were very closely associated; prune juice in one instance and bottled soft drinks in the other made of fruit juice flavor, and the names were the same, "Sunsweet."

In the case of Physicians Electric v. Adams, the services, or such they seemed to be, for the most part, of electrical instruments for physicians were identical, and the names were identical.

And if those are the cases upon which we are to judge unfair competition here——

The Court: Those are not the only ones. Those are some of them.

Mr. Beehler: They are not all of the cases, but they are representative.

The Court: But they laid down the rule. Go back to my own case, the case which preceded this case, the case which we thought at one time we

would try along with this, in that case the business was more unrelated than was this one. The man was chiefly engaged in manufacturing and constructing [285] fluorescent lights, and it was insisted at that time by Mr. Mason, who is a patent lawyer of long experience, that there was no relation between the two. But I applied the rule there. It seems to me at the present time that the law is clear in California on one side, and in the Circuit on the other, that there does not have to be competition. Judge Garrecht made that point very, very plain. A point that I adverted to right in the beginning when I cited from the Stork Club case, that there need not be competition in the field, and Judge Wilbur makes it plain in the Del Monte case.

Of course, if you have a dissimilarity of mark, and also a dissimilarity in product, then of course different inferences can be drawn, and that was the inference I drew in the Vita-Var case. There was a difference in mark, and there was also a difference in product, and there, where there was no similarity between the product and the other I found as a matter of fact that there was no infringement. But I take it that the law is absolutely clear that there need be no similarity. And the unfortunate part of the law is this, that even if the choice of name is fortuitous, as I found in the Brooks case—nothing could be more fortuitous—nevertheless where there was a similarity of name, and in that case, of course, the similarity was in a proper name, the foundation for the action [286] exists.

Mr. Beehler: In the Brooks case, we have just been talking about, there the goods were identical in your Honor's own words.

The Court: Yes. There is another case I did not cite, of Jackman v. Mau, 78 California Appellate (2d) 234. They said on page 239:

> "Another element involved in cases of this character is the watchfulness of the law in protecting the public from the fraud or deceit resorted to by a pretender to falsely lead the buying public to believe that they are purchasing the goods of the merchant who, through a trade name and honest effort, has established a reputation and public demand for his product (Carolina Pines, Inc., v. Catalina Pines, 128 Cal. App. 84, 87 (16 P. 2d 781)). And the fact that defendant was using his own name does not shield him from injunctive action if such use is calculated to cause confusion or to deceive."

Further it states:

> "Also, it is not necessary as a prerequisite to obtaining equitable relief in cases of this character that the names be identical. It is sufficient if though not identical they are sufficiently similar as to cause confusion and injury (Academy of Motion Picture Arts & Sciences v. Benson, 15 Cal. 2d 685, 692 (104 P. 2d 650)). [287] In the case just cited (p. 692), the Supreme Court quotes with approval the following rule enunciated in the case of Cellu-

loid Mfg. Co. v. Cellonite Mfg. Co., 32 F. 94, at page 97: 'Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.' "

In other words, the entire stress in both the federal and state law is that on similarity it is likely to mislead, not whether it actually does mislead.

Mr. Beehler: Taking that as a measure of law——

The Court: From the testimony already given, and which I did not know until the last moment, this is not an ordinary case of a man on the West Coast starting out in business. This is a son who starts to use a name of a manufacturing concern that the father conducts, to such an extent that there is a use. This place is designated. So there is an element of purpose there which would not be present if the relationship between the parties were not such as this.

The argument as to whether he just stumbled on that [288] name falls by the wayside. He chose it deliberately with a purpose, and used it for that purpose.

Mr. Beehler: Nowhere in the testimony is there a fact which points to the intention of the defend-

ant to take advantage of the good will of the plaintiff.

The Court: There does not have to be. The deliberate choice of a name is enough.

In the Brooks case, the reason the man chose "Brooks" was because a salesman told him it was a nice name. It was better than "Greenberg" for attracting customers.

Mr. Beehler: Here the facts show that the businesses of the two companies are alien to each other.

The Court: That is merely a corporate name. The father is a partner in this business. As I glanced through this deposition, even without reading the entire deposition, it is quite apparent that the two of them worked together, because otherwise. if he were only a depositor, just as somebody else, the father would not advertise his national business as having an outlet here, the only outlet he advertises in conjunction with his own, and the fact that there is no showing that at any other time were any lamps of any other concern featured. There is the family relationship between the parties, shown by the fact that the father is a defendant in this lawsuit and is a part of the corporation here, which puts an entirely different light upon this case, than if the name had been [289] fortuitous. And when you bear in mind that the company in Illinois specializes in making lamps, then you can seen the willfulness and the intent there.

Mr. Beehler: If we are to dwell on the activities of the Illinois company——

The Court: They are a part of them because

the father is, also. The father is a party to this lawsuit. He is one of the corporation. The father is also the head of the corporation there. Judges cannot shut their eyes to realities.

Mr. Beehler: Our evidence shows——

The Court: The evidence also shows that the one is tied to the other, such as, for instance, in the advertisement you yourself put in.

It is strange indeed that a national concern should use one company as an outlet, unless there were a peculiar relationship between the two, and the relationship arises from the fact it is a family corporation, controlled by members of one family, which is perfectly all right.

The son cannot say, "I have nothing to do with that corporation," when his father, who is the head of that corporation, is a part of this very corporation. So that when he pushes this particular item, he has to take the full consequences of the relationship.

Mr. Beehler: Our evidence shows that the father and the Expert Lamp Company used the name "Sunbeam" for 25 years. [290]

The Court: That is all right. That does not settle the matter.

Mr. Beehler: It is not inferred by act or deed or any evidence that the use on the part of the Expert Lamp Company of the word "Sunbeam," their desire to continue the use of that, is to protect a business——

The Court: That is a good business argument to make, but it is not a legal argument, because

you know very well in the Emerson case and all those cases people were stopped from using the name, who were entitled to use the name because it was their own personal name. Nevertheless, when they used it they used it in such a manner as to create confusion. The mere fact it was their given name did not help them in the matter. You have not attacked the validity of this trade-mark.

Mr. Beehler: Where the defendant has developed his own good will and where the trade turns to him because of his own good will—and that is all that has been shown here——

The Court: That is a good argument on the damages. But they have waived damages. They had better waive them because they have not made any showing that the damage has resulted, which could be transmuted in the form of damages.

Furthermore, they remember the ruling in the case that laches might stand in the way of recovery, as they did in the other case. But prior use does not enter into this [291] matter at all, as where a man has acquired a prior local use. A prior local use means absolutely nothing, as against a person who has developed a product and associated a name with it to such an extent that in the mind of the public the one spells the other.

Let me give you an illustration of a case, and I mentioned this case in the other lawsuit, and Mr. Mason said that he had tried that case before me. I did not remember, because, as you know, I do not remember personalities of lawyers. I know

lawyers that come before me, but whether a lawyer is in one case or another I do not remember.

That same argument was made in the other case. I called attention to an incident that happened when I was on the Superior Court. A man had used a street signal, an old-fashioned street signal, as an emblem, as a trade name for a gas station.

A suit was brought by Signal Oil Company who had adopted the signal and been incorporated under that name, and used it for many, many years. I held that the prior use by the man was not such as to prevent Signal Oil Company from claiming its use, and from establishing, as they did in that case, the secondary meaning of the emblem and the association with the products of the Signal Oil Company.

Mr. Beehler: If that argument is carried through to its ultimate conclusion, then, as the court in Illinois said, [292] "Why make a distinction in trade-marks at all?" If by adopting a word and by putting enough money behind its advertising a company can get the public to think about that word as theirs, why not give them a right to that mark absolutely?

The Court: I am not interested in what the court in Illinois said. I am interested in what my circuit, the Court of Appeals, has said. I am bound by what they say. I am sending a lot of business to them, too, to try under the new transfer rules. But I am not bound by what a judge in Illinois says, any more than he would be bound by what

I say here. I am bound by the rules of this circuit and I am not bound by the rules of their circuit.

Very recently one of their judges and I disagreed. It happened he was wrong and I was right. I would not stop the trial of a case to wait until the Supreme Court decided his case, because I knew he was so dead wrong. That was the rent case. The result was, as I anticipated, that he was reversed and my decision was upheld.

Mr. Beehler: Here is a case——

The Court: So I am not bound by a court of another circuit, by what it says. I realize that the courts in other circuits have not stated the doctrine so clearly, but next to the Second Circuit the Ninth Circuit has stated the law of unfair competition in such clear words that there is no room for trying to distinguish away the cases. Nothing could be [293] clearer than the language in the last four cases, which include the Brooks case, and I did not mention that case because it is mine. After all, they adopted it. They did not write an opinion of their own. They adopted it. You know what happened in that case.

There were four cases. The Brooks case, the Stork Club case, the Safeway case, the Lerner case, and the Maternity Lane case: those contain all the law of the circuit, and they are up to date. [294]

Mr. Beehler: If we refer to the Lerner case, there the court held there was not a likelihood of confusion.

The Court: But there was a proper name case.

There was a man using his own name in running a store in San Jose, a place where Lerner stores did not have an outlet. Furthermore, when the question arose the man did not call it Lerner Stores, but put his first name in front of Lerner and also put a line under it saying, "Locally owned."

Mr. Beehler: Here is a case where two companies are in unrelated businesses. The Sunbeam Corporation has never invaded the business of the defendant, because it has never engaged in the home furnishings business.

The defendant has never invaded the business of the plaintiff, because it sells only home furnishings and has never sold any electrical appliances.

The Court: Except lamps.

Mr. Beehler: No one here with their testimony has identified lamps as electrical appliances.

The Court: They do not have to do that. The court can make that conclusion.

Mr. Beehler: There is an abundance of testimony here in this case which is uncontradicted, that lamps are a matter of interior decoration. They are bought from the point of view of interior harmony, and not upon electrical performance. It is that point, your Honor, that we place much reliance upon. [295]

The Court: I ruled against that in the other case. If your contention is correct, then my decision in the other case is wrong. I think it is perfectly right. While it is not final, it is conclusive on me unless new facts are brought to my attention. Under

your contention I decided that case wrong and I do not think I did.

Mr. Beehler: I am familiar with the facts in that case. The product was fluorescent lights. In that case, or, rather, in respect to fluorescent lights, they are bought on electrical performance. They are not bought from the point of view of interior decoration.

The Court: You merely read the short memorandum I wrote.

Mr. Beehler: Yes.

The Court: You did not hear the testimony of contractors from all over the country and even some from the School Board who testified that to them fluorescent lights have nothing to do with the desk lamps.

As a matter of fact, the entire case was built by Mr. Mason upon that proposition, that it was a separate segment of an industry. He produced catalogs to show that it was unrelated, which were some of these national books they put out, to show that fluorescent lights are not classified as electrical appliances or fixtures or anything of the kind. They are of a separate classification. The doctrine of classification [296] was made the subject of very extensive proof.

Mr. Beehler: It is our contention that the kind of lamps we handle are not in the same category as the fluorescent lamps or the desk lamps of the other case.

The kind of lamps and the kind of trade that is interested in the decorative lamps of the defend-

ant are not the kind of trade that are interested in fluorescent fixtures, on the ceiling, even. And that they look to buying a living room set and not even the plaintiff will contend that Sunbeam relates to living room sets. If the customer is buying a living room set and it is in the Victorian period, he wants a lamp in the Victorian period, whether it is Sunbeam or anything else.

The Court: I can find no justification for such splitting the segmentation of business in the law of unfair competition and the law of trade-mark.

Mr. Beehler: There must be a dividing line some place.

The Court: It is an equitable principle that has been developed by the courts. The courts do get some credit sometimes. It is an equitable principle that has been developed by courts because of the bad business ethics of business people. Business people always hold themselves to be superior to we lawyers and judges. It is well to remember that courts developed the doctrine of unfair competition because of the rotten stealing methods of certain business [297] men, of stealing the other man's products, so that the courts evolved this system of stopping piracy.

Mr. Beehler: I don't think the defendant can be charged with stealing any good will.

The Court: That is the disadvantage of having your client sitting here. He will think I am talking about him. I am not talking about him. I am talking to a subject and I am not talking about the defendants in this case.

I am saying this entire law is equitable. Therefore, the trend is not to split hairs, but to give a broad concept.

I will refer you to the Restatement. The Restatement represents the distillation of scholars who sought to distil to their minimum the principle upon which all men agree. The Restatement says specifically that confusion may arise in an entirely unrelated field.

Mr. Beehler: I would also like to touch upon the question of alleged trade-mark infringement. Taking the facts at their worse, there are three labels involved here; let us say, rather, three tags. The defendant has a price tag which it uses. It says on it "Sunbeam Furniture Corporation." It gives its address.

The defendant also handles merchandise in package form, some lamps, and those lamps carry a tag, too. It is a very distinctive tag. It is a blue tag with a gold seal on it. They are all alike. They say "Sunbeam." True enough, there [298] is an initial on it, an L that forms a background for the lettering. On it in bold face type, and smaller, admittedly, but in bold face type is the name and address of the manufacturer. It is not concealed, not misrepresented.

The plaintiff has its own tags on red and white paper, and some are black and red and various colors, but every place the word "Sunbeam" is written in a patricularly characteristic way, and shown throughout, it trade-marks the same way.

Aside from the fact that the name is "Sunbeam,"

there isn't any similarity at all in the tags affixed to the merchandise. There isn't anything about the tags of the Expert Lamp Company or the Sunbeam Furniture Corporation which does anything more than boost to the public they stand behind their own goods. Their own name is there. Their own address is there. They don't simulate an appearance of the plaintiff's goods or the plaintiff's mark in any way. Therefore, there is no trade-mark infringement.

Further, still on the part of the defendant here in this case, which is not the Expert Lamp Company, it uses no trade-mark at all at any time. Its price tag never leaves its own premises. There is no positive evidence in this case which can commit the defendant here to a charge of trade-mark infringement.

We have touched on the matter of unfair competition. I have the benefit of your Honor's remarks. I have attempted [299] to make our contention clear.

I feel that the facts are as we have presented them, and they do not show unfair competition, either under California law or federal law. And that since it also does not show a trade-mark infringement we cannot be charged with an injunction.

The Court: I want to call your attention to a section in the Restatement. It is Section 714. It is a statement which bears a good deal upon the proposition.

That it is not even necessary for the buyer to know that a trade-mark comes from a particular

source. This is what it says under paragraph b under Comments of Section 715:

> "In the market, the chief value of a trade-mark may be its power to stimulate sales. In law, the fundamental theory upon which the interest in a trade-mark is protected is that a trade-mark identifies the goods coming from a particular source, or passing through a particular channel of distribution, and that an infringing designation tends to divert custom from that source by falsely representing that other goods come from it. Compare Sections 730-732. But this theory does not mean that the trade-mark indicates a source known to purchasers. It means only that a trade-mark indicates that the [300] goods in connection with which it is used come from a common source, whether the source is known or anonymous; that one article of a class of goods bearing the trade-mark comes from the same source as all other articles of that class which bear the same trade-mark. One may, therefore, have a trade-mark for goods which he markets as manufacturer, jobber, wholesaler or retailer. And one may have several trade-marks, even for goods of the same kind."

Then in the portion relating to unfair competition, the Restatement says that in the last analysis, except for the origin of the rights of protection, there is no difference between infringement of a trade-mark and unfair competition.

Under paragraph a of the Comment of Section 717 it says:

> "The language of some opinions indicates that there are such differences: that for infringement of the former the appropriate remedy is an action for trade-mark infringement, while for infringement of the latter the appropriate remedy is an action for unfair competition, that 'fraud' on the part of the actor is essential in trade name infringement but not in trade-mark infringement and that the scope of relief against the one is [301] narrower than that against the other."

One is narrower than the other. Then it says, "First, there are at present no important differences in the procedure."

And then, "Second, there is no real distinction, with reference to the element of fraud, between the infringement of trade-marks and trade names as defined in Section 716.

> "In the earliest cases, no discrimination was drawn between designations which are now called trade-marks and those which are now called trade names. The issue in each case, was whether the defendant imitated the marks, labels or dress of the plaintiff's goods for the purpose of passing off other goods as those of the plaintiff's manufacture. The action at law was an action on the case in the nature of deceit."

Then going on:

> "Subsequently, equity courts began to try the legal right themselves. Because of the distinctiveness of the trade-mark which identified the manufacture of one person exclusively, some equity judges began to regard the trade-mark itself as the 'property' of that person."

Then going on further it states:

> "A trade name is, however, no less [302] effective than a trade-mark as a means of identification. Whether a designation identifies the goods of one person is a question of fact necessary to be answered in determining whether the designation is a trade name. When that determination is made, there is no more reason for a requirement of 'fraud' in the trade name cases than in the trade-mark cases. It is only when the plaintiff's designation is neither a trade-mark nor a trade name, and the case is considered under the rule stated in Section 712, that fraud is an essential element of liability."

Then as to the Elements of Infringement it says:

> "The liability imposed under the rule stated in this Section protects a person against harm to his business which the actor might cause by misleading prospective purchasers into identifying the actor's goods, services or business with those of the other. The ultimate issue in infringement cases——"

and they mean both of them.

"——is the likelihood that prospective purchasers will be so misled."

So that the actual misleading is not material. It may have a bearing on damages. The law does not allow general [303] damages, but actual loss of money in dollars and cents. There, of course, the fact whether there was loss of customers would become material. [304]

So I am referring to these statements to show that in the last analysis the same principles underlie both branches of the case as now understood. I agree that in the early cases you can draw a lot of finespun distinctions, but the law has been so clarified in the last few years by writers like Chaffee and others, that some of the dicta in the older cases lose all significance. So I think in the last analysis if the plaintiff is entitled to recover at all, the same facts that would entitle him to recover under one would entitle him to recover under the other, as it stands now, without the requirement of damages. If he is entitled to an injunction under the unfair competition, which is infringement of trade name, he is entitled to it under the other, because the validity of the trade-mark has not been attacked.

Mr. Beehler: In response to that, if there is any trade name here, the use of which is chargeable to the defendant, it has to be the trade name "Sunbeam" which appears on the tag of the Expert Lamp Company.

The Court: If a man exhibits a lamp with the

tag, he is just as liable primarily as the manufacturer.

Mr. Beehler: There is a case which holds, and I quote, "One who buys another's goods may use or sell them with the latter's trade-mark on them." That language appears in the case of B.V.D. vs. De Vega City Radio, 16 Fed. Supp. 659.

The Court: That is a general statment that might be [305] approved, but it does not settle this particular case. It does not mean if a man uses an emblem which is visible, not a hidden mark, in selling a product, he can avoid responsibility by merely claiming that it wasn't his trade-mark.

It would not apply to a case of this character, because the evidence shows clearly, in the first place, that these tags were very large, could be seen easily. Even I, who is nearsighted, can read the script on the large one without using my glasses. And it works the other way, because in this particular case where the trade-mark is not embedded into something solid, there is nothing to prevent him from tearing off the tag and selling it without it.

A statement of that character doesn't mean anything. I agree with you if it appeared that somebody casually got one lamp and sold it under the label, that you couldn't make out a very strong case for injunction enjoining him from doing the same thing in the future. But that is not the situation here. You have at least one person who is connected with both corporations, who pushes the merchandise, features it in the window, and facts like that, which have to be considered.

Mr. Beehler: I would also like to comment briefly, on that same point, on some of the cases the plaintiff apparently relied upon. He cited the case of Saratoga Vichy. But in that case, although the defendant used water bottled [306] by somebody else, he put his own trade-mark on it before he sold it.

The Court: The Vichy case turned on the fact that for many years people had been allowed to use the name, and the Supreme Court said that they are not going to, at this late date, 20 or 25 years after the name Vichy had come into use, allow them to clamp down a monopoly. But when it came to the Dubonnet case, the courts did it the other way.

You gentlemen have educated me in the last 14 years. When I got on this bench I did not know very much about this branch of the law, because I had been a judge of the Superior Court and we didn't have many of these cases, although I did have some of these cases even there. But now I have had so many of these that I know those cases myself.

Mr. Beehler: All of these cases which the plaintiff has cited, there was some element of falseness in them.

The Court: I agree with you that the old cases so state. That is why I read this statement from the Restatement, because the Restatement says now that the element of palming off, the element of fraud, is no longer necessary.

Judge Garrett in the Stork case——

Mr. Beehler: Even in the Stork case they were both in the restaurant business.

The Court: In the Stork case he lays down the rule, the rule which the Restatement adopts, and it is a very elaborate [307] opinion. He subdivides it into paragraphs and treats each separately. I like that way of writing opinions. That is the way I always have written opinions.

Mr. Beehler: There they had a fanciful name, Stork Club, and——

The Court: But he lays down the rule that the element of good faith is not an element at all.

I am trying to reduce our area of disagreement as much as possible, if I can.

By the way, in this case he has a subhead, "Trade names and trade-marks stand on a similar footing." I assume he wrote that himself, because it is part of the opinion. I know I do that. He gave us his summary of the law.

Mr. Beehler: There was no intermediary there, like there is here.

The Court: I understand that. He quotes from Hanover Star Milling Company vs. Metcalf, on page 354 of the Sahati case:

> "This essential element is the same in trade-mark cases as in case of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition. * * *

"The appellees insist that, because of [308] their 'most humble field of operation' they cannot be considered to be in competition with the appellant, whose place 'is of the highest.' Since they are not in competition at all, obviously—so runs their argument—they cannot be in unfair competition with the appellant. Plausible as this contention may seem, it does not correctly state the law."

Then he cites the Academy of Motion Picture Arts and Sciences vs. Benson.

He cites this statement:

"A very recent statement of the doctrine is to be found in Hanson vs. Triangle Publications, 8 Cir., 1947, * * *: 'there can be unfair competition although the businesses involved are not directly competitive. Under present general law, the use of another's mark or name, even in a non-competitive field, where the object of the user is to trade on the other's reputation and good will, where that necessarily will be the result, may constitute unfair competition."

The Academy of Motion Picture Arts and Sciences vs. Benson is a very good illustration in California, because there they were entirely different fields. The Academy of [309] Arts and Sciences, as we know, is this group representing producers and others interested in the motion picture art to award Oscars. You read this morning's newspaper about the nominees for the Oscars, which are the

prizes. And this man was running a school, an entirely different field. Nevertheless, the Supreme Court of California said that it didn't make any difference.

Mr. Beehler: Here the defendant has attempted to avoid trading upon the good will of the plaintiff by relating the goods to itself every time. When it sells lamps of the Expert Lamp Company, it identifies the source particularly. And with respect to itself, it does only a wholesaler's trading business, and does not play upon the name "Sunbeam."

The Court: In this Academy of Motion Picture Arts and Sciences vs. Benson, to which I have already referred, the defendant conducted a dramatic and coaching school and called it "The Hollywood Motion Picture Academy." There wasn't even very much similarity in names, except they used "Motion Picture Academy" while the other used "Academy of Motion Picture Arts and Sciences." Certainly the Hollywood Academy of Motion Picture Arts and Sciences is not engaged in coaching or anything of the kind. That problem was raised there. Here is what the Supreme Court of California said, and this is a unanimous opinion written by Judge Shenk. He began his career as a judge of the Superior Court of this County. This is [310] in 15 Cal. (2d) 685. It is cited in those cases I referred to yesterday. This is what he said. The court pointed to the fact that it is novel in that it involved an entirely different field, that a coaching school had absolutely nothing to do with the business of the plaintiff. This is what the court said,

after referring to its prior case American Philatelic Society, at page 692:

> "And it does not appear necessary that the parties be in competitive businesses or that the injury has already occurred. It is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury."

And they cite quite a number of cases, including the Celluloid Manufacturing Company vs. Cellonite Manufacturing Company, and they repeat the statement that I have already read into the record from the Cellonite case, saying: "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

While the actual number of decisions in which the field is the same is greater, there are cases, and this Academy case is one of them, which applied the rule to entirely [311] dissimilar fields. Judge Garrett, speaking for the Circuit, adopts the very language that I just read as stating the law, because there it was argued that this humble saloon should not be compared with the topnotch Stork Club. But in the Benson case you have an even greater dissimilarity because one of them was a group of motion picture personalities associated for the purpose of mutual protection, and for the purpose of

awarding prizes each year to the best acting in the field of motion pictures, and the other one was an humble woman who was teaching, coaching actors and actresses, who called herself the Academy, and yet the court said specifically that the dissimilarity is not in itself sufficient.

Mr. Beehler: I can conclude, and I would like to conclude by making this reference to the evidence which has been before us the last day and a half, namely——

The Court: I am not stopping you. As a matter of fact, you were ready to sit down when I made you stand up again.

You know my system. If you don't, Mr. Huebner knows it, because he has been before me more often than you. That is the only way I know of of clarifying my own thoughts, that is why I like oral argument rather than briefs, because I cannot ask questions of a brief, but I can ask questions of the man who writes the brief, so I do it to clarify my thoughts. I do not mean to curtail your argument. I am merely telling [312] you what my conception of the law is so you will have an opportunity to answer if you can.

Mr. Beehler: A summary of the evidence that we have had here, all of the direct evidence, if you might call it that, which relates to how the goods appear, has been almost entirely pointing to the fact that there is no confusion, there is no actual confusion, that there are no instances of confusion directly. On the other hand, there were the surveys, and it is only the surveys which appear to indicate

that there is likelihood of confusion, and it is our contention that those surveys were engineered, taken under unnatural circumstances, and that that should be weighed against the other testimony which points in the other direction. With that I conclude, your Honor.

The Court: All right.

Mr. Pattishall: Although I disagree with almost everything Mr. Beehler has said, your Honor, I do not think any purpose would be served by further argument.

Thank you for your courtesies, sir.

The Court: There is one matter I want to take up. There is an exhibit mentioned in this deposition.

Mr. Pattishall: That exhibit is the same photograph of a lamp that is attached to the complaint, and that is Exhibit D, I believe, your Honor. I think that was a reference to the original [313] complaint.

Mr. Beehler: Isn't that the same as Exhibit 1 in evidence?

Mr. Pattishall: No. That is the more recent lamp.

The Court: Let me take a short recess. It won't take me more than 15 minutes to read this deposition. I don't know what is in it. I think I would rather read it before I excuse you. So let's have a recess and I will read the deposition, and then I will see if any thought occurs to me.

(A recess was taken.) [314]

* * *

"Even assuming the absence of any competition of toilet tissues and Dunnell's covers for protection of toilet users, Stores is entitled to its injunction. The principle is well stated in Judge Learned Hand's opinion in Yale Electric Corporation v. Robertson, 2 Cir., 26 Fed. (2d) 972, at page 974, 'However, it has of recent years been [344] recognized that a merchant may have a sufficient economic interest in the use of his trade-mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

* * *

"The appellees insist that, because of [345] their 'most humble field of operation' they cannot be considered to be in competition with the appellant whose place 'is of the highest.' Since they are not in competition at all, obviously—so runs their argument—they cannot be in unfair

competition with the appellant. Plausible as this contention may seem, it does not correctly state the law." [346]

* * *

"The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second. This has been, and perhaps even more now is, the whole Law and the Prophets on the subject, though it assumes many guises. Therefore, it was at first a debatable point whether a merchant's good will, indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing-gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities." [348]

* * *

"It is true that the complaint contained no allegation of actual business competition between the parties. However, defendant did not demur upon that ground, and at the trial made no objection to evidence which, as hereinafter stated, clearly proved the existence of such competition." [350]

* * *

"It is unnecessary, in such an action, to show that any person has been confused or deceived.

It is the likelihood of deception which the remedy may be invoked to prevent. * * * 'It is sufficient if injury to the plaintiff's business is threatened, or imminent, to authorize the court to intervene to prevent its occurrence.' "

Skipping some lines, and reading from page 70:

"Appellant argues that the record shows that plaintiff and defendant do not manufacture the same items or solicit the same trade and customers. Plaintiff's name has become a valuable asset in connection with any equipment associated with automobiles, and the evidence shows that the bulk of defendant's business is manufacturing automobile jacks and wrenches. However, it is not always necessary to prove actual market competition where the purpose of the action is to [351] secure injunctive relief. It was stated in Wood v. Peffer, 'We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word "unfair" rather than "competition." ' "

"Plaintiff has established a reputation for reliability and meritorious products. If articles which are not produced by him are attributed to him or associated with his name the injury is obvious. The court stated in the case of Del Monte Special Food Company v. California Packing Corporation, 34 Fed. (2d) 774, at page 775: 'The injury to the appellee by the use of the Del Monte Brand by the appellant does not result from preventing sale by appellee of oleo-

margarine of its own, but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control. Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production.' Furthermore, [352] in the interest of fair dealing courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. For this purpose the second in the field may be enjoined from using the name, even though the principal places of business are at a considerable distance from each other. * * * 'No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. . . . The universal test is whether the public is likely to be deceived.' " [353]

* * *

"I did not intend to rule, and could not very well rule, under the law of the Ninth Circuit, that the mere fact that the custom of the late comer came from a limited segment of an industry is sufficient to avoid infringement. Indeed, the rule is the other way. For, if there is

any principle established firmly in the law of the Ninth Circuit, and in the law of California, which must govern the unfair competition phase of the case,—it is that infringement and unfair competition may be found to exist as between non-competitive fields and products.''

I cited the Safeway case and the Stork Restaurant cases, and then I continued:

> ''And it is implicit in the last decision of our Court of Appeals on the subject, Lane Bryant, Inc., v. Maternity Lane, Limited, of California, Ninth Circuit, 173 F. 2d 559, and in the leading California cases which have, time and again, been referred to by our courts in disposing of these matters.'' [354]

* * *

> ''All these cases adopt as the test, the effect of imitation on the average person and stress the point that the power of a court of equity may be invoked 'without market competition.' They do not limit the application of the rule to fanciful names. They apply it to ordinary names when they have acquired a secondary meaning, i.e., they have become so associated with a product as to create what the Restatement (Restatement, Torts, sec. 730) calls 'confusion of source' in the minds of the public. Any other rule would be unrealistic and encourage deception and fraud.'' [355]

* * *

[Endorsed]: No. 12628. United States Court of Appeals for the Ninth Circuit. Sunbeam Furniture Corp., Arthur M. Luster, Melvin R. Luster and Frieda Luster, doing business as Sunbeam Furniture Sales Co., Appellants, vs. Sunbeam Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Appeal No. 12,628

SUNBEAM FURNITURE CORP., a Corporation; ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, Individuals Doing Business as SUNBEAM FURNITURE SALES CO.,

Appellants,

vs.

SUNBEAM CORPORATION, a Corporation,

Appellee.

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE PRINTED RECORD ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit

No Statement of Points on Appeal or Appellants' Designation of Contents of Record on Appeal having been served by appellants on appellee or on any of its attorneys as required by Rule 19(6) of the Rules of Practice of this Court, appellee hereby submits, within ten days after receiving from the clerk of this Court actual notice, on October 31, 1950, of the filing in this Court of the appellants' State-

ment of Points on Appeal and Designation of Contents of Record on Appeal, the following as its Designation of Additional Parts of the Record, Proceedings, and Evidence to be Contained in the printed Record on Appeal:

(1.) The entire Reporter's Transcript of Proceedings, Pages 1 through 366, inclusive, the same being, in addition to the portions designated by appellants, the following:

1. Pages 79 through 188, inclusive.

2. Pages 279, line 24, through 314, inclusive.

3. Pages 344, line 19, through page 345, line 17.

4. Page 345, line 25, through page 346, line 8.

5. Page 348, line 6, through line 20.

6. Page 350, line 9, through line 15.

7. Page 351, line 8, through line 25.

8. All of pages 352 and page 353, line 1 through 15.

9. Pages 354, line 3, through line 23.

10. Page 355, line 1 through 366, inclusive.

(2.) This designation.

The Clerk of the United States Court of Appeals for the Ninth Circuit is accordingly requested to print and include the foregoing designated material

in the printed record in the above-entitled case now on appeal to this court.

Dated this 3rd day of November, 1950.

ROGERS AND WOODSON,

By /s/ BEVERLY L. PATTISHALL,
Attorneys for Appellee.

A copy of the foregoing Appellee's Designation of Additional Parts of the Record, Proceedings and Evidence to be Contained in the printed Record on Appeal was served on Huebner, Beehler, Worrel and Herzig, 610 South Broadway, Los Angeles 14, California, by regular mail, postage prepaid, this 3rd day of November, 1950.

BEVERLY L. PATTISHALL,
Attorney for Appellee.

[Endorsed]: Filed November 6, 1950.

No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBEAM FURNITURE CORP., ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, doing business as SUNBEAM FURNITURE SALES CO.,

Appellant,

vs.

SUNBEAM CORPORATION,

Appellee.

APPEAL BY THE DEFENDANTS FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, IN A TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION ACTION.

APPELLANT'S OPENING BRIEF.

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No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Sunbeam Furniture Corp., Arthur M. Luster, Melvin R. Luster and Frieda Luster, doing business as Sunbeam Furniture Sales Co.,

Appellant,

vs.

Sunbeam Corporation,

Appellee.

APPEAL BY THE DEFENDANTS FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, IN A TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION ACTION.

APPELLANT'S OPENING BRIEF.

The Appellants will hereinafter be referred to in their joint capacity as Defendant and Appellee as Plaintiff.

Jurisdiction.

Final judgment was entered on the 3rd day of April, 1950 [R. 75] and Notice of Appeal was filed on the 3rd day of May, 1950 [R. 75, 76]. Provisions of 28 U. S. C. A. 1338 confer original jurisdiction upon the District Court and jurisdiction upon this court to review the judgment appealed from is conferred by 28 U. S. C. A. 1291. No question of jurisdiction or pleading is raised by this appeal.

Statement of the Case.

Plaintiff's first complaint named as Defendants Sunbeam Furniture Corporation *et al.,* a California corporation, and Expert Lamps, Inc., a corporation of Illinois. On February 4, 1949, an order was granted quashing service of process on Expert Lamps, Inc., because it was outside the jurisdiction of the court. On February 4, 1949, an amended complaint was filed omitting Expert Lamps, Inc. as Defendant. Plaintiff sets up trademark registrations of the trademark SUNBEAM for sundry electrical appliances [R. 31-32] and charges Defendant with trademark infringement by sale of a decorative lamp bearing a tag with the name "Expert Lamps, Inc." and Expert's trademark SUNBEAM imprinted thereon, and with unfair competition by use of the name "Sunbeam Furniture Corp." in a strictly furniture business which includes the sale of decorative electric lamps. It is not clear which of Plaintiff's trademarks is relied on as being infringed.

Defendant in answer denies that sale of electric lamps constitutes sale of Plaintiff's electrical goods, denies trademark infringement by use of the mark on any goods, and denies unfair competition by employment of the name "Sunbeam Furniture Corp." in its furniture business [R. 39, 40].

Defendant has not contested validity of Plaintiff's trademark but has challenged Plaintiff's right to extend claim to the mark beyond the specific goods covered by the trademark registrations identified in the complaint.

The trial court enjoined Defendant from continuing to use the name SUNBEAM in connection with its furniture business or upon any of the products from whatever source which it sells and from doing anything calculated to induce

belief that Defendant is any way connected with Plaintiff or its goods. Damages were waived by Plaintiff.

Since judgment was entered by the trial court in this case the appeal in a companion case, *Sunbeam Lighting Co. et al. v. Sunbeam Corporation,* Appeal No. 12357 in this Circuit, ... F. 2d ......, 86 U. S. P. Q. 240, was decided and in the opinion filed June 30, 1950, the scope of Plaintiff's trademark SUNBEAM was defined as limited to its own specific field. In that field Plaintiff's trademark was held to be valid.

Because of that decision the Defendant in this case does not challenge the validity of Plaintiff's trademark but does rely upon the limited scope of the trademark as defined by the Court of Appeals.

Evidence.

Plaintiff claims ownership in a great many trademarks all directed to electric appliances such as mixers, flat-irons, coffee-makers, toasters and grills, to mention a few. Plaintiff merchandises a limited number of industrial items. All but very few appliances are motor driven. Appliances are sold on a basis of quality performance to individual consumers. Plaintiff contends its trademark to be applicable to a very extensive segment of the industry devoted to electrical goods without claiming or showing actual use by Plaintiff of the trademark on articles other than electric appliances. Plaintiff's case against Defendant here is based upon the contention that decorative table lamps are within the scope of Plaintiff's trademark protection regardless of how or to whom they may be sold.

Defendant is engaged in the business of buying a great variety of household furniture, warehousing it for the con-

venience of retail dealers in southern California and selling it at wholesale. Among the multitude of items of household furniture handled is a small percentage of decorative lamps, comprising bases and lamp shades. Merchandise is shipped to Defendant from the manufacturers in crates and cartons in which Defendant re-ships the contents to its customers without opening. Single samples of the various items are displayed to Defendant's customers at three restricted show-rooms from which the general public is expressly excluded.

Defendant uses no tradename or trademark of any kind but employs only price tags and shipping labels upon which appears the full name of the Defendant, "Sunbeam Furniture Corp."

One of Defendant's many suppliers is Expert Lamps, Inc., an Illinois corporation which employs the trademark SUNBEAM on decorative lamps. Some of these are handled by Defendant in the same fashion as all of Defendant's other merchandise.

Defendant has a substantial business and good will in its own special field.

Questions Involved.

The real issues in this case are whether or not Defendant by employment of the name "Sunbeam Furniture Corp." in a business limited entirely to the wholesaling of furniture competes unfairly with Plaintiff because of Plaintiff's ownership in the trademark SUNBEAM for electrical appliances, and whether or not Defendants, by re-selling decorative lamps, only some of which carry the trademark Sunbeam of Expert Lamps, Inc., infringe Plaintiff's trademark. In all cases and on all products the full name of the Defendant or his supplier, or both, boldly appear.

Specification of Errors Relied Upon.

The trial court has committed reversible error in each of the following respects:

1. In finding that Plaintiff uses its trademarks on lamps in general and other similar products [Finding 15, R. 66; Points on Appeal 2].

2. In finding that Defendant sold electric appliances bearing the trademark SUNBEAM [Finding 19, R. 68; Points on Appeal 3].

3. In finding in effect that all electric lamps sold by Defendant were manufactured by Expert Lamps, Inc. [Finding 21, R. 68; Statement of Points 5].

4. In finding that Defendants have no good will in the word SUNBEAM [Finding 23, R. 69; Statement of Points 7].

5. In failing to find that use of the trademark SUNBEAM by Expert Lamps, Inc. has been contemporaneous with use of the trademark SUNBEAM by Plaintiff for twenty to twenty-five years [Statement of Points 9].

6. In finding that Defendant's decorative lamp bases and shades are of a character likely to result in confusion with Plaintiff's electrical appliances [Finding 30, R. 70; Statement of Points 13].

7. In finding that there was actual confusion between products of Defendants and products of Plaintiff [Finding 31, R. 70; Statement of Points 14].

8. In finding that use of SUNBEAM by Defendant is likely to and does result in confusion [Finding 38, R. 71; Statement of Points 20].

9. In finding that the word SUNBEAM indicates to the trade and to the public Plaintiff and Plaintiff's goods, without qualification [Finding 41, R. 71; Statement of Points 20].

10. In concluding that use by Defendant of "Sunbeam Furniture Corp." or "Sunbeam Furniture Sales Corp." as a name or business style constitutes unfair competition [Conclusion 5, R. 72; Statement of Points 22].

11. In concluding that Defendant's sale of products bearing the trademark SUNBEAM infringes Plaintiff's trademark SUNBEAM [Conclusions 4, 6, R. 72; Statement of Points 23].

12. In concluding that use by Defendant of SUNBEAM will inevitably be likely to create confusion [Conclusion 8, R. 72; Statement of Points 24].

13. In failing to give proper weight and credence to Defendant's testimony [Statement of Points 28].

14. In failing to find that electrical appliances manufactured by Plaintiff are completely unrelated to general household furniture sold by Defendant [Statement of Points 30].

15. In failing to find that the class of customers who buy Plaintiff's goods at retail is entirely different from the discriminating customers who purchase Defendant's products at wholesale [Statement of Points 31].

16. In failing to find and distinguish between the fact that Plaintiff's goods are sold and offered for sale to the general public, whereas Defendant's goods can only be seen

in three restricted show-rooms by special arrangement [Statement of Points 32].

17. In failing to hold that Defendant employs no trade-mark whatsoever on the goods or packages at any time [Statement of Points 33].

18. In failing to distinguish between the corporate entities of Defendant, Sunbeam Furniture Corp., a California Corporation, and Expert Lamps, Inc., a corporation of Illinois [Statement of Points 36].

19. In failing to weigh the fact that 99% of Defendant's furniture business does not carry the trademark SUNBEAM in any guise and that only 1% of Defendant's furniture business consists of sale of lamps and shades carrying trademark of Expert Lamps, Inc., namely, SUNBEAM applied thereto [Statement of Points 37].

20. In according to a non-fanciful trademark the same degree of monopoly normally accorded a fanciful mark [Statement of Points 39].

21. In holding that Plaintiff established actual and probable confusion among buyers of Defendant's goods as to the origin of Defendant's goods [Statement of Points 42].

22. In holding that Defendant adopted the name SUNBEAM to capitalize upon Plaintiff's reputation [Statement of Points 44].

23. In enjoining Defendant from using or continuing to use SUNBEAM as part of its name in its furniture business or upon any products which it sells.

Summary of Argument.

Point 1. Sunbeam is a non-fanciful mark, being a word in common usage; as such it should be given but a limited scope.

(a) Prior use of Sunbeam.

(b) "Sun" plus various suffixes has enjoyed a widespread use on a great diversity of products.

(c) Sunbeam in its ordinary sense is descriptive.

Point 2. Character of the goods manufactured and sold by Plaintiff under the trademark defines its scope.

(a) Plaintiff is consistent in marketing a line of electric appliances.

(b) Appliances do not mean household furniture.

(c) Plaintiff is not entitled to preempt trademark rights outside its own field.

(d) Plaintiff's employment of mark on specific goods only is an admission of the limited scope of the mark.

Point 3. Defendant does business only in its own field and that field is not the Plaintiff's.

(a) Plaintiff's goods and Defendant's goods are different and entirely unrelated.

(b) Lamps and lamp-shades as sold by Defendant are accessory only to its household furniture business.

(c) Suppliers of Defendant's merchandise employ their own special marks, which they, the suppliers, apply to the goods—Some have no trademark.

(d) The manner of sale and type of customers supplied by Defendant are different from those of Plaintiff.

(e) Defendant advertises only to the wholesale field.

POINT 4. There is no actual confusion.

(a) Plaintiff's witnesses found no confusion.

(b) Instances of purported actual confusion are questionable.

(c) Defendant's witnesses saw no evidence of confusion.

(d) Plaintiff's surveys were in a field never entered by Defendant.

POINT 5. There is no likelihood of confusion.

(a) Unrelated goods are not likely to be confused.

(b) Display and sale of Defendant's goods only in restricted show-rooms establishes no likelihood of confusion.

(c) Defendant employs no tradename on its goods. Price tags are removed before shipment.

POINT 6. There is no trademark infringement.

POINT 7. There is no unfair competition.

(a) No competition in fact exists and this should be considered.

(b) Good will attaching to Plaintiff's products is of no value to Defendant who sells only a special service.

(c) Defendant's customers and trade are never confused as to origin of Defendant's goods.

THE ARGUMENT CONDENSED.

POINT 8. The Trial Court's findings have no basis in fact, and its conclusions are erroneous.

POINT 9. The judgment exceeds the proof and is in error.

ARGUMENT.

POINT 1. SUNBEAM Is a Non-fanciful Mark, Being a Word in Common Usage; as Such It Should Be Given but a Limited Scope.

(a) Prior Use of SUNBEAM.

This Court of Appeals has already passed upon the scope and validity of the trademark SUNBEAM as used by the Plaintiff herein in the previously decided case of *Sunbeam Lighting Co. v. Sunbeam Corporation,* Appeal No. 12357 (*supra*). In that case this court had before it sufficient evidence of diverse prior use of the trademark SUNBEAM to justify its holding that its meaning has "spurred the innumerable usages of the word as a short, terse, recognizable, rememberable insignia."

Expert Lamps, Inc. has made use of SUNBEAM on lamps contemporaneously with Plaintiff's use of SUNBEAM on appliances for the past twenty or twenty-five years [R. 255].

(b) "SUN" Plus Various Suffixes Has Enjoyed a Widespread Use on a Great Diversity of Products.

Use of the trademark SUNBEAM, SUN, or SUN-plus a common suffix has occurred almost numberless times throughout the United States. Plaintiff attached no significance to those other uses. The attention of plaintiff's President Graham was called to fifty-one instances of use of SUNBEAM on divers businesses when he was asked if these divers uses had been searched and investigated prior to change of plaintiff's name from Chicago Flexible Shaft

Co. to Sunbeam Corporation. The same witness's attention was directed to thirty-eight uses of SUN or SUN-plus a common suffix such as SUNBEAM, SUNRISE, SUNRAY, etc., on divers businesses [R. 159-166 and Ex. B].

This Court of Appeals reviewing the materiality of such widespread use has made the following language of record in its decision:

> "The trial court's conclusion goes to the extent that, because the plaintiff has a registered and common law trademark of the word 'Sunbeam' and use thereof in relation to its actual produce and because of its extensive business, that word is plaintiff's sole property in commerce in the whole broad electrical field. This conclusion extends the restriction on the use of a non-fanciful word far beyond any instance that we are aware of. We are unwilling to affirm the holding that the possibility or the actual proof of an occasional instance of a person's surmise that defendants' print of 'Made by Sunbeam Electrical Appliance Co., Los Angeles, California' or similar wording in a catalog or on an electrical fluorescent fixture suggests plaintiff as the manufacturer, and is enough to support the injunction. The law goes to no such extreme."
>
> "The differentiation of strong and weak marks is well discussed and defined in American Steel Foundries v. Robertson, 269 U. S. 372 (1926); Majestic Mfg. Co. v. Majestic Elect. App. Co. Inc., 6 Cir., 172 F. 2d 862 (1949); Dwinell-Wright Co. v. Nat. Fruit Co., 1 Cir., 140 F. 2d 618 (1944); and Arrow Distilleries v. Globe Brewing Co., 4 Cir., 117 F. 2d 347 (1941), all in appellant's opening brief."
>
> "The word 'Sunbeam' is not a fanciful term with little use in the English-speaking world."
>
> *Sunbeam Lighting Co. v. Sunbeam Corp.*, ... F. 2d ...., 86 U. S. P. Q. 240, 243.

Use of a non-fanciful mark in a closely related field will not be enjoined unless use would indicate a common origin.

If businesses are non-competitive the apprehension of confusion is less.

American Automobile Insurance Company v. American Auto Club, 87 U. S. P. Q. 59 (C. C. A. 9).

This court is well supported by other authorities.

A later user of "White House" for vegetable juices was held to prevail over a prior user of "White House" for coffee and tea when the prior user attempted to use "White House" on fruit juices.

Dwinell-Wright Co. v. National Fruit Product Co., 140 F. 2d 618 (C. C. A. 1).

The trademark "Majestic" was held non-fanciful and therefore not to warrant preventing a manufacturer of electric irons and toasters from using the mark in view of a prior use of "Majestic" on gas stoves and electric plates.

Majestic Mfg. Co. v. Majestic Electric Appliance Co., Inc., 172 F. 2d 862 (C. C. A. 6).

"Gold Medal" though widely used for flour was held distinctly not original or fanciful and not infringed by "Gold Medal" when used on a pancake flour mix.

France Milling Co. v. Washburn-Crosby Co., 7 F. 2d 304 (C. C. A. 2).

"Arrow" was held a word of such common usage that it could be used without confusion by one manufacturer for beer and by another manufacturer for cordials.

Arrow Distilleries v. Globe Brewing Co., 117 F. 2d 347 (C. C. A. 4).

(c) Sunbeam in Its Ordinary Meaning Is Descriptive.

The trial judge in examining defendant's price tag was impressed by the tag on the lamp of one of defendant's suppliers evidencing "a sundial, a big circular sign with a fancy L running through it. You have a circle there about three inches" [R. 360].

In California where sunshine is so widely publicized Sun plus some suffix or other is a commonly used descriptive term. The Sunset Home Furniture Company is located on the prominent Sunset Boulevard in Los Angeles [R. 325]. Sunkist is a tradename of wide publicity referring to California fruit. Defendant in selecting Sunbeam envisioned Sunbeam signifying the ray of a sun and being in California and finding no one else using the name Sunbeam in the furniture business considered it appropriate for a California business [R. 251].

Plaintiff's untenable position is revealed where it takes the stand that Sun-plus any suffix for any electrical goods is an infringement [R. 120, 121, 127].

The word "Simplex" because it had been registered about sixty times by as many different parties on different kinds of merchandise was held strictly non-fanciful and in the same class as "Star" and "Sunlight".

> *American Steel Foundries v. Robertson,* 269 U. S. 732, 70 L. Ed. 317.

The relative scope of strong and weak marks is discussed at length by the able judge in *Pease v. Scott County Milling Co.,* 5 F. 2d 524, 525, D. C. E. D. Mo., 1925. It will be apparent that the decision of this Ninth Circuit is in accord with the other circuits in holding that a mark like Sunbeam is obviously a weak mark and not entitled to protection beyond its immediate field.

POINT 2. Character of the Goods Manufactured and Sold by Plaintiff Under the Trademark Defines Its Scope.

(a) Plaintiff Is Consistent in Marketing a Line of Electric Appliances.

Plaintiff's many trademark registrations emphasize *electric appliances such as flat irons, heating pads, toasters, portable heaters, percolators, pipe lighters, food mixers, clocks, fans, juicers, dry shavers, clippers and hedge trimmers, to mention a few* [R. 5, 6]. All are electrically operated. Almost all need a motor. *No lamps for general illumination are included.* No household furniture is included. Only cabinets, receptacles and display stands for Plaintiff's kitchen appliances are mentioned in its list of trademarks.

Plaintiff's goods are limited to "traffic appliances" [R. 139, 140]. Various "traffic appliances" are defined by example [R. 142] wherein vast quantities sold are noted.

Plaintiff has never sold large appliance items such as electric ranges, ironing machines, and washing machines [R. 140]. Plaintiff has never sold crockery, framed pictures [R. 141], table lamps with or without shades, lamp shades, floor lamps [R. 143], smoker's tables [R. 144], divans, easy chairs, cocktail tables, hassocks [R. 145], occasional chairs, bedsteads, cedar chests, mattresses, desks [R. 146].

Plaintiff's stock in trade is a high quality appliance and is sold on performance [R. 179].

(b) Appliances Do Not Mean Household Furniture.

Plaintiff has attempted to define household furniture relying upon the dictionary definition as anything and everything movable which goes into a home. Plaintiff's practice, and general practice also, treats appliances as specific well-defined merchandise not in the category of furniture. Plaintiff's counsel recognizes the distinction in questioning the witness Strandstra where he asks first of the witness:

> "Q. Do they handle lamps? A. Yes, they handle a large assortment of lamps.
>
> Q. Decorative table lamps? A. I would assume that they would be classified, some of them, decorative, yes, sir * * *.
>
> Q. Does that concern also handle appliances? A. Yes, they do." [R. 182, 183.]

Plaintiff's witness Strandstra also recognizes the difference when he answers:

> "A. The lamp department is spread through the biggest portion of the store, with the exception I would say—everything is more or less broken up into different departments (73) such as the rug department, appliance department; *the lamps don't fit into that department, we don't use them there.*" [R. 185.] (Emphasis ours.)
>
> "Q. All lamps in fact are confined to the furniture portion of the premises are they not? A. Well, in our store they are, yes, sir." [R. 186.]

The same witness identifies all Plaintiff's products known to him as traffic appliances [R. 186, 187]. Lamps are not appliances in the opinion of a furniture salesman [R. 194].

Electric appliances are treated as something separate from furniture in the Los Angeles Furniture Mart [R. 208]. Plaintiff's witness, Wilson, employed in her father's appliance shop defines their line of large appliances and small appliances. Small appliances mean to her: "Well, hand irons, toasters and waffle irons and mixers" [R. 314]. That store handles the complete Sunbeam line. When customers come in *"They will ask for a Sunbeam iron or toaster, waffle iron"* [R. 314]. (Emphasis added.)

Plaintiff's witness Brandenburg recognizes what the term means. When SUNBEAM is mentioned to her she recalls SUNBEAM appliances in her home and names them as *"a mixer and a coffee maker and an iron,* and my husband has had two or three SUNBEAM razors" [R. 329]. (Emphasis added.)

Plaintiff's witness Jesse Hampshire recognizes the trademark SUNBEAM to mean ". . . electrical products we have in our home, what I have, in particular. *I have a mixer and a waffle maker"* [R. 331]. (Emphasis added.)

Seven others of Plaintiff's witnesses would make the same statement that what SUNBEAM means to them is electric appliances sold by Plaintiff [R. 333].

(c) Plaintiff Is Not Entitled to Preempt Trademark Rights Outside Its Own Field.

Plaintiff does not manufacture and sell light sockets and plugs for anything other than its electrical appliances [R. 121]. Plaintiff has never manufactured an extension cord. That is the only thing electrical which Defendant ever utilizes.

There is a great field of electrical products which Plaintiff does not touch. Plaintiff never makes or uses its mark

on street lights, search lights, flash lights, auto lamps, landing field lights, traffic lights, flood lights, radio lights, Christmas tree lights, neon signs, beacon lights, flash bulbs, photo flood lamps, miner's lamps. Plaintiff does not use its trademark on other electrical things such as relays, radios, elevators, machine tools, generators, street cars, outlet boxes, cable and wire, insulators, lightning rods, aerials, ammeters and voltmeters, transformers, batteries, thermostats [R. 126-127]. Plaintiff does not even make all types of electrical appliances. Apparently there is some limit to Plaintiff's claim of a right to use SUNBEAM on electrical goods.

Plaintiff clearly manufactures and sells goods which appeal to the retail trade. Plaintiff never buys and resells goods of another manufacturer under another's trademark [R. 168]. In this respect Plaintiff's business differs considerably from defendant's business with respect to items manufactured and sold as well as to manner of sale.

(d) Plaintiff's Employment of Mark on Specific Goods Only Is an Admission of the Limited Scope of the Mark.

When Plaintiff recently incorporated under the new name, Sunbeam Corporation, it did not investigate a host of other users, having made no search [R. 123, 124, 158]. obviously it was of no concern to Plaintiff that SUNBEAM may have been used in fields other than its own when it chose its corporate name.

No furniture dealer in Los Angeles handles Plaintiff's products, namely, Plaintiff's electrical appliances [R. 130]. Though display stands are not appliances they are not sold [R. 152].

Electric appliances are treated as something separate from furniture in the Los Angeles Furniture Mart [R. 208]. Plaintiff's witness, Wilson, employed in her father's appliance shop defines their line of large appliances and small appliances. Small appliances mean to her: "Well, hand irons, toasters and waffle irons and mixers" [R. 314]. That store handles the complete Sunbeam line. When customers come in *"They will ask for a Sunbeam iron or toaster, waffle iron"* [R. 314]. (Emphasis added.)

Plaintiff's witness Brandenburg recognizes what the term means. When SUNBEAM is mentioned to her she recalls SUNBEAM appliances in her home and names them as *"a mixer and a coffee maker and an iron,* and my husband has had two or three SUNBEAM razors" [R. 329]. (Emphasis added.)

Plaintiff's witness Jesse Hampshire recognizes the trademark SUNBEAM to mean ". . . electrical products we have in our home, what I have, in particular. *I have a mixer and a waffle maker"* [R. 331]. (Emphasis added.)

Seven others of Plaintiff's witnesses would make the same statement that what SUNBEAM means to them is electric appliances sold by Plaintiff [R. 333].

(c) Plaintiff Is Not Entitled to Preempt Trademark Rights Outside Its Own Field.

Plaintiff does not manufacture and sell light sockets and plugs for anything other than its electrical appliances [R. 121]. Plaintiff has never manufactured an extension cord. That is the only thing electrical which Defendant ever utilizes.

There is a great field of electrical products which Plaintiff does not touch. Plaintiff never makes or uses its mark

on street lights, search lights, flash lights, auto lamps, landing field lights, traffic lights, flood lights, radio lights, Christmas tree lights, neon signs, beacon lights, flash bulbs, photo flood lamps, miner's lamps. Plaintiff does not use its trademark on other electrical things such as relays, radios, elevators, machine tools, generators, street cars, outlet boxes, cable and wire, insulators, lightning rods, aerials, ammeters and voltmeters, transformers, batteries, thermostats [R. 126-127]. Plaintiff does not even make all types of electrical appliances. Apparently there is some limit to Plaintiff's claim of a right to use SUNBEAM on electrical goods.

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No furniture dealer in Los Angeles handles Plaintiff's products, namely, Plaintiff's electrical appliances [R. 130]. Though display stands are not appliances they are not sold [R. 152].

The name SUNBEAM signifies appliances.

> "The Court: * * * when they asked for SUNBEAM what do you understand them to ask for?
>
> The Witness: Well, I know that they want a SUNBEAM appliance." [R. 181.]

In considering the trademark the witness Strandstra said "Well, SUNBEAM, as far as I know, there is only one SUNBEAM, like SUNBEAM toasters, mixmasters, razors." The name means the company that manufactures mixmasters and that sort of thing [R. 183].

To plaintiff's witness Algyer SUNBEAM means toasters and shavers [R. 375].

To Plaintiff's witness Jackie Still SUNBEAM means "Mixmaster and Coffeemaster, toaster" [R. 395].

To none of the host of Plaintiff's witnesses who gave testimony does SUNBEAM *mean a lamp.*

The Plaintiff has made its name SUNBEAM prominent in the electrical appliance field. In that field it may exclude infringers but the right does not extend beyond that field.

> Before a trademark can be granted under the applicable Lanham Act, the application therefor must name the product to which it is to apply. 15 USCA Sec. 1051.

Also registration defines the right in a particular field. In doing so they merely carry forward the common law right which also limits the trademark to its own field.

> "The trademarks should be confined substantially to the articles for which they were authorized, otherwise, why limit the mark at all?"
>
> *California Fruit Growers Exchange v. Sunkist Baking Co.,* 166 F. 2d 971, 974 (C. C. A. 7).

As held, therefor, the registration of "Sunkist" on edible fruits did not entitle Plaintiff to enjoin another from using "Sunkist" for edible bread.

> "The right to the exclusive use of a trademark or tradename is limited to the territory or market wherein it has become established by use in such territory."
>
> *Griesedieck Western Brewery Co. v. People Brewing Co.,* 149 F. 2d 1019, 1022 (C. C. A. 8).

Where one by the name of Lerner in his own territory established a merchandising business and made known his identity with certainty, he was not infringer of the trade name "Lerner Shops" established elsewhere.

> " '* * * it is the duty of a person with the same or similar name, subsequently engaging in the same or similar business or dealing in like goods, *to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader.*' (Emphasis supplied.) 59 F. 2d at page 15. In this case such steps were taken."
>
> *Lerner Stores Corporation v. Lerner,* 162 F. 2d 160, 164 (C. C. A. 9).

Titles of magazines having a similar connotation have been held not confusing where the facts indicated that there was no real confusion.

> "Each case must be determined in the light of its particular facts."
>
> " '*A publisher though he has a registered trademark cannot be protected from all of the inadequacies of human thought and memory.*" (Emphasis added.)
>
> *Palmer v. Gulf Pub. Co.,* 79 Fed. Supp. 731, 737, 738 (U. S. D. C. S. D. Calif., 1948).

POINT 3. Defendant Does Business Only in Its Own Field and That Field Is Not the Plaintiff's.

(a) Plaintiff's Goods and Defendant's Goods Are Different and Entirely Unrelated.

Defendant sells no appliances whatsoever [R. 194]. Products made by plaintiff would not be classified as household furnishings or home furnishings [R. 195-196]. Lamps and table lamps are not classified as appliances but rather as home furnishings, furniture [R. 196]. Defendant sells about twenty different items of home furnishings or furniture and lamps are one of the twenty [R. 196]. In the Gladden Brothers Furniture store, Wolf as a furniture salesman never went into the separate appliance section [R. 193].

Defendant's line of merchandise features primarily such things as bedroom sets, dining room sets, chrome furniture, chairs, lamp tables and lamps, occasional tables [R. 216], crockery, hassocks, occasional furniture [R. 217].

Elements Which Control Selection of Home Furnishings.

> "Q. In the sale of living room furniture, for example, what elements control the selection of one piece as against another? A. Well, style, color, size and just whether it fits in or not, in the home. Personal taste is the deciding factor. * * *
>
> Q. In the sale of lamps in your experience with the Sunbeam Furniture Corporation, what elements control the selection of decorative lamps? A. Well, the same situation exists. I mean you have to [191] have the style of the lamp to fit in, and personal taste, and color. Well, those are the deciding factors just whether you like it or not." [R. 191, 192.]

The particular manufacturer of any lamp has nothing to do with the selection.

In furniture stores an almost uncounted variety of lamps and of as many different manufacturers are carried. The Wolfe and Frankel Company, employers of the witness Wolfe, carried fifty to sixty manufacturers' lamps. Gladden Brothers carried lamps of about 100 manufacturers. They were in every conceivable pattern and variety [R. 193]. Clearly the great variety is to meet the great variety of taste and to have those items conform with a comparable variety of furniture.

Lamps and shades are sold together and are part of the same decorative pattern [R. 193]. Defendant always sells the shade and base together [R. 249].

(b) Lamps and Lamp-shades as Sold by Defendant Are Accessory Only to Its Household Furniture Business.

Plaintiff's witness, Garriott, recognizes that lamps are sold in accordance with design, and that source of manufacture is of no consequence [R. 176, 177]. One dealer in a sales talk on lamps to plaintiff's witness emphasized that he was selling ceramic ware and that the value lay in that [R. 326]. In comparing lamps to clothing the witness Wolfe remarked that the purchase of a lamp is a matter of personal taste [R. 198]. When the witness Wolfe was employed by the Gladden Brothers Furniture Company he was just in the furniture end of it and there sold bedroom, living room and dining room furniture, tables, lamps, rugs, carpets [R. 190]. Decorative lamps are items which complete a line of home furnishings. It would be a definite hindrance in the home furnishings business not to handle floor and table lamps conforming to the particular furniture handled [R. 229].

If a furniture dealer were prohibited from carrying decorative lamps to match his line it would definitely affect the sale of the furniture [R. 231].

Of defendant's whole line of household furniture lamps represent only 2% and lamps manufactured by Expert Lamps, Inc., carrying Expert's trademark SUNBEAM, comprise but 1% [R. 226]. All the lamps are decorative in character [R. 221].

Plaintiff's witness Enfield saw no more than about five lamps of the same style among the hundreds in the Broadway Department Store lamp department [R. 349].

(c) Suppliers of Defendant's Merchandise Employ Their Own Special Marks, Which They, the Suppliers, Apply to the Goods. Some Have No Trademark.

Trademarks are not important to buyers of lamps. Customers seldom ask for a special brand of lamp [R. 197]. They are not concerned with the manufacturer's identity [R. 196]. Lamp buyers are not trademark conscious as evidenced by the attitude of plaintiff's witness Sahl [R. 392]. *Defendant's witness Ives never looks at trademarks when she buys a lamp but is concerned only with style* [R. 371]. Plaintiff's witness Jackie Still is unaware of the trademark on the lamps in her own home [R. 395].

Defendant in its business of wholesaling furniture finds that many suppliers use no trademark [R. 222].

Defendant in the three restricted showrooms where samples of suppliers products are displayed applies to the product only defendant's price tag bearing no trademark but which reads "Sunbeam Furniture Corp., 1337 So. Flower St." The tags are prominently displayed [R. 210]. The tags are used only on the showroom floor [R. 200].

Those tags are removed before the goods are shipped [R. 200]. The predominant practice in defendant's business is to ship the goods to the customer in the same crates or cartons as received from the supplier without ever unpacking or repacking. The manufacturer's cartons are used. Only a label having on it "Sunbeam Furniture Corp." and defendant's address is added to provide a place for the customer's name and shipping address [R. 201]. Some lamps sold by defendant carry the trademark of Art Lighting Co. [R. 245, Exhibit BB].

(d) The Manner of Sale and Type of Customers Supplied by Defendant Are Different From Those of Plaintiff and Customers Are Discriminating Purchasers.

Defendant's business consists solely of sales to retail merchants. Defendant does not engage in a retail business. Defendant's customers are therefore limited to retail merchants who buy at wholesale. They know with a high degree of certainty with whom they do business. Defendant on its store front carries its full name Sunbeam Furniture Corp. [R. 214, Exhibit D]. No customer could be deceived by this. Defendant sells at wholesale only [R. 205].

Sunbeam Furniture Corp. buys as wholesalers and distributors furniture of all descriptions. It advises the customers the manufacturer of the goods [R. 285, 286]. The Sunbeam Furniture Corp. is purely and simply a jobber. The sales are to furniture dealers in California [R. 287]. When plaintiff's witness Wilson sought to buy an Expert Lamp from defendant, defendant's salesman Ain called personally at the Wilson store and made the sale. Wilson

bought as a retail dealer [R. 322]. Plaintiff's witness Enfield carried a card as a privileged purchaser to defendant's showroom when he made a purchase [R. 346]. He needed a card to be admitted.

Defendant's salesmen trade only with a particular clientele and the customers know precisely with whom they are dealing.

(e) Defendant Advertises Only to the Wholesale Field.

Plaintiff engages in no consumer advertising. It advertises only in one trade magazine "Furniture Field", which magazine is sold only on subscription [R. 211]. No electrical appliances are advertised by defendant in that magazine [R. 211, 212]. Such direct mail advertising as is engaged in is directed to retail dealers.

Defendant has no display or show window where any goods are displayed to the general public [R. 215]. Only bona fide dealers can gain entrance to the showroom or those having proper credentials [R. 215].

Plaintiff does not advertise in "Furniture Field" at any time [R. 156]. From numerous examples of plaintiff's advertising and the showing of its name on cards, packages and the like, it is obvious that plaintiff brings its name and trademark prominently and primarily before the consuming public which is a manner of advertising and publicity wholly unlike that practiced by defendant. While it may be true plaintiff distributes through wholesalers and distributors, its trademark is carried through to the consumer and it is a consumer business.

It is clear therefore that the defendant is engaging in its own business in its own way and following a practice completely foreign to plaintiff's business.

The Defendant in this case has a well-established business selling furniture at wholesale. It has built up a substantial good will in its business name Sunbeam Furniture Corp. It has a right in that field not to be molested by others like the plaintiff. This principle has substantial support in the law.

Use of "Par" for household laundry soap was held not to infringe a previously established use of "Par" for mechanics soap.

> "* * * appellant had no right thereafter to extend its use of the name to interfere with granulated or bar soap of appellee's manufacture."
>
> *Treager v. Gordon-Allen, Limited,* 71 F. 2d 766, 768 (C. C. A. 9).

Where the complaining party made no repair parts for ignition systems and alleged infringer did, complaining party had no right to interfere with the other business, although marks were almost the same.

> "The mere fact that one person has adopted and used a trademark on his goods does not prevent the adoption and use of the same or a similar trademark by others on articles of a different description."
>
> *Philco Corporation v. F. & B. Mfg. Co.,* 170 F. 2d 958, 961 (C. C. A. 7).

See also:

> *Gold Dust Corporation v. Hoffenberg,* 87 F. 2d 451, 452 (C. C. A. 2).

POINT 4. There Is No Actual Confusion.

(a) Plaintiff's Witnesses Found No Confusion.

In the entire experience of Fred Wolfe as a salesman in the Sunbeam Furniture Corporation's showroom there was never one occasion where any customer evidenced confusion between Defendant's products and Plaintiff's products [R. 195].

Luster never had anyone ask for a lamp manufactured by the Sunbeam Corporation [R. 251].

Philip Ain during all of his time as salesman for the Sunbeam Furniture Corporation never had anyone raise the question of there being any connection between Sunbeam Furniture Corporation and the Plaintiff [R. 263].

No one ever attempted to purchase from Mr. Ain electrical appliances of any kind [R. 262, 263].

The purchase of a lamp was made for the Wilson Appliance Store from Mr. Ain. There was no question but that Mr. Ain represented no one other than the Defendant [R. 264-265].

No dealer has ever expressed the understanding to Mr. Ain that manufacturer of the Sunbeam lamp (Expert Lamps, Inc.) was the company that manufactures mixmasters and devices of that kind [R. 264-265].

(b) Instances of Purported Actual Confusion Are Questionable.

Plaintiff's witness, Garriott, was in the appliance business in Pasadena handling appliances and also some lamps. It was four and one-half years before anyone came into his store and asked for a SUNBEAM lamp. The witness's answer is as follows:

> "* * * a customer came in our store and asked for a Sunbeam lamp, and I told her that I didn't know

> they made a lamp, and she was very indignant and finally she asked me, 'Do you know all of the things that Sunbeam makes?' I named over everything that I knew of that they made, and she said 'Well, I saw one down in L. A.' and turned around walked out very indignant."

Rehearsal of the incident by the witness under cross-examination [R. 173] gives every indication that the purported inquiry by a single customer was an inquiry engineered for the sole purpose of manufacturing evidence. No other inquiry was ever made before or since [R. 175]. Witness made no effort to guide the customer to a source of Sunbeam lamps because "I hadn't heard of it before."

The only purchase of a Sunbeam lamp ever made for the Wilson Appliance Store was one purchase expressly requested by Conley of the Sunbeam Corporation [R. 316]. Witness Wilson knew the Sunbeam lamp was not Plaintiff's lamp [R. 319]. Witness Wilson had a copy of an "ad" with the name Expert Lamp Co. of Chicago on it, taken from a trade publication when Wilson asked Defendant's salesman for the particular lamp which was purchased [R. 264]. Plaintiff's witness, Gibson, in laying a trap to secure an expression of confusion failed to give convincing testimony of such confusion. She says:

> "A. We talked with Mr. Lane, and in talking to him, I told him that I had a Sunbeam Mixmaster-Sunbeam mixer, rather, and was curious to know if it was the same company that made the lamps.

He said it was the same corporation, but a different division. They made all kinds of electrical appliances. I asked him 'Is it the same company that makes the Sunbeam mixers?' He said 'Yes.'" [R. 325.]

The same paid canvasser then visited Kay's Department Store. The only Sunbeam lamps there in evidence were with ceramic bases, carrying the Expert Lamp Co. tag [R. 325].

Witness Enfield saw a Sunbeam lamp at the Globe Furniture Company. He knew it was made by Expert Lamp Company—therefore, not the Plaintiff, and also not the Defendant in this case [R. 351].

(c) Defendant's Witnesses Saw No Evidence of Confusion.

Witness Wallick was in business selling appliances for 18 years and carried floor lamps at one time. In all of that time no one ever came into his store and asked for a Sunbeam lamp [R. 181]. Witness Strandstra, who was manager of the Traffic Appliance Dept., in a Pasadena store four and one-half years never had anyone ask to be sold a Sunbeam lamp [R. 186].

(d) Plaintiff's Surveys Were in a Field Never Entered by Defendant.

Plaintiff surveyed the wrong market. The surveys were door to door canvasses of housewives and of casual persons who were stopped on the street, ninety-five per cent of whom were women. None of the persons were ques-

tioned on premises where lamps are sold or under circumstances where such persons would be likely to purchase lamps. Bedroom sets are not sold on the street corner and neither are the lamps which go with them. Among all of the 1500 persons or more questioned, not one buyer for a retail store was questioned. The circumstances do not represent the market for Defendant's goods nor are persons questioned representative of Defendant's customers. Answers of the persons questioned under those circumstances could be no more than casual.

Questions asked of the persons surveyed appear on Exhibit 10. The questions were clearly keyed to indicate to the person questioned that there might be other products made by makers of a lamp. One question reads: "Do you know whether the company that makes this lamp makes any other product or products?" The only article demonstrated to persons questioned was a photograph. The photograph showed a lamp only and all environment was removed. The photograph was not in color but merely in black and white. There is no contention on anyone's part that persons in the market for a decorative lamp purchase the lamp by inspection of a black and white photograph. Ninety-five per cent of the persons questioned were women. No men having answered, the percentages by calculation are in error. Men purchase lamps also. *But no one buys them in the street.*

POINT 5. There Is No Likelihood of Confusion.

(a) Unrelated Goods Are Not Likely to Be Confused.

Lamps are furniture, and especially decorative lamps sold by Defendant. The thing which makes this article of furniture electric is a conventional cord and plug [R. 250]. A lamp is not sold on its electric performance. Neither is the socket, cord and plug. Such electric items are in such common usage that surely no one would expect them to be marketed exclusively by the Plaintiff. The Plaintiff in fact manufactures no such things.

Lamps are furniture and Plaintiff knew better than to attempt to show that anyone could be confused into thinking that the sellers of bedroom furniture under the name Sunbeam Furniture Corp. could conceivably be the Sunbeam Corporation makers of electric appliances. That decorative lamps are just as remote from Plaintiff's appliances is equally obvious.

On the date of Plaintiff's incorporation, Plaintiff knew of no use by Defendant of the term SUNBEAM for any goods whatever. Being in a different field that is natural [R. 158, 159]. Plaintiff's witness Strandstra knew that lamps were furniture [R. 186]. Plaintiff's witness Wilson in a complete appliance store had no lamps [R. 318, 321].

(b) Display and Sale of Defendant's Goods Only in Restricted Show-rooms Establishes No Likelihood of Confusion.

One of these show-rooms is in the Los Angeles Furniture Mart. Defendant occupies 700 square feet of an area of about 300,000 square feet devoted almost entirely to furniture. Purchaser to gain access must be a bona fide retail dealer and carry credentials in the form of an admittance card. Defendant also has a comparable dis-

play in the San Francisco Furniture Mart, where a simillar practice of admission is prevalent [R. 216].

The only other place Defendant's products are on display is the Sunbeam Furniture Corp. Showroom, 1337 South Flower Street. At that location admission must also be by card. Mr. Enfield needed a card for admission [R. 120]. When he purchased the lamp the lamp was consigned to Vander Furniture Mart and not to Enfield. The show-room on Defendant's premises is located on the second floor and there is no window for display purposes [R. 215]. Where Defendant's products are offered for sale in this manner, no customer or purchaser of normal mentality could possibly be deceived.

(c) Defendant Employs No Tradename on Its Goods. Price Tags Are Removed Before Shipment.

The witness Wilson saw no tag of Sunbeam Furniture Corp. on the lamp purchased [R. 320-321]. The witness Wolfe does not consider SUNBEAM used in the guise Sunbeam Furniture Corp. a brand name [R. 202]. Defendant manufactures nothing, Defendant sells nothing under its own private brand and never sends out goods labeled with any trademark belonging to Defendant [R. 212]. The name SUNBEAM never appears alone but only in combination with the words "Furniture Corp." Defendant has no other kind of label [R. 213]. Canvasser Trotman was not aware of the company which made the lamp as being makers of any other products [R. 368]. Canvasser Ives never looked at the trademark on a lamp [R. 371].

Where origin of Defendant's goods clearly appears, there is no confusion even though marks are similar.

> "Anyone deceived or confused by the Plaintiff's package into believing he was getting the defendant's

package would be careless to a degree that the law has no duty to protect."

Quaker Oats Co. v. General Mills, 134 F. 2d 429, 432 (C. C. A. 7).

Actual confusion must be real and not compounded of scattered inadvertencies and mistakes.

Although the names may be the same, "Horlick" and "Horlick's", "the obligation resting upon defendant in using his name is not to insure that every purchaser will know that he is the maker, but to use every reasonable means to prevent confusion."

Horlick's Malted Milk Corp. v. Horlick, 143 F. 2d 32, 36 (C. C. A. 7).

The mere fact that a survey suggests the possibility of confusion is not conclusive. Where the survey fails to reach defendant's customers it means nothing. It does not show those customers to be confused.

> "When met in the market place, the product of the parties left no room for doubt as to their source or their nature. There was no confusion there. That is the place that counts. Purchases of merchandise are not made in a vacuum with Professor Quiz in charge."

Quaker Oats Co. v. General Mills, supra, citing from page 433.

Surveys of the sort relied upon by the Defendant in this case at bar are entitled to little weight. The court in this circuit has so ruled saying:

> "The evidence contains reports of pollers who exhibited a photograph of defendants' portable fluorescent lamp which show that some persons jumped to the conclusion that because it had the word

'Sunbeam Lighting Co., Los Angeles' in sight that it was manufactured by plaintiff in Chicago."

Sunbeam Lighting Co. v. Sunbeam Corp., supra, citing from page 243, U. S. P. Q.

The court in the cited SUNBEAM case then called attention to the fact that other more reliable evidence was contrary. Where purchasers are discriminating there is less likelihood of confusion. Defendant's customers are discriminating retail merchants.

> "In this case the goods of the parties are substantially identical, but they are relatively expensive and undoubtedly their purchase would be made only after a careful comparative investigation of different apparatus for air conditioning systems. These facts, together with the dissimilarity of the marks, impel us to the conclusion that the marks are not confusingly similar."

Syncromatic Air Conditioning Corporation v. Williams Oil-O-Matic Heating Corporation, 109 F. 2d 784, 785 (C. C. P. A., 1940).

> "A new competitor is not held to the obligations of an insurer against all possible confusion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. Skinner Mfg. Co. v. General Foods Sales Co., Inc., D. C., 52 F. Supp. 432, 433, 450."

Life Savers Corporation v. Curtiss Candy Co., 182 F. 2d 4, 8 (C. C. A. 7).

That the new competitor is not an insurer against all possible confusion is the doctrine adopted by this Court of Appeals.

Sunbeam Lighting Co. v. Sunbeam Corp., supra.

POINT 6. There Is No Trademark Infringement.

No proof has been offered of the sale of any product by Defendant bearing a trademark possessed either by Defendant or Plaintiff. No proof is offered of any sale by Defendant in interstate commerce of any product whatsoever. The fact that Defendant sells lamps supplied by Expert Lamps, Inc., carrying the trademark and tag of Expert Lamps, Inc., even though that tag may bear the name SUNBEAM is immaterial. There is no contributory infringement in trademark cases. Defendant therefore cannot be a trademark infringer inasmuch as it does not employ the trademark as a tradename in any guise whatsoever. Use of the name SUNBEAM as practiced by Defendant could not create confusion of origin because the name SUNBEAM is invariably used to denote only "Sunbeam Furniture Corp." and could mean nothing else. The trial court appears to have lost sight of the fact that Defendant's business is the furniture business.

Inasmuch as Defendant uses no tradename of any kind but only Sunbeam Furniture Corp., Plaintiff apparently relies upon the SUNBEAM tag of Expert Lamps, Inc., as the infringing mark. Expert Lamps is not a party here. Service against it was quashed.

Where the Defendant does not apply the mark it is not an infringer. In a case where Truscon Laboratories applied the word "Ironite" to a roofing material which was

subsequently sold by Defendant with that name left on it, the court held:

> "It follows from these findings of fact that the defendant has not infringed the copyright of the Ironite Company."
>
> *Ironite Co. v. Guarantee Water-Proofing Co.*, 52 F. 2d 288, 290 (D. C. W. D. Mo., 1931).

> "One who buys another's goods may use or sell them with the latter's trademark on them. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co., 92 F. 774."
>
> *B. V. D. Co. Inc., et al. v. Davega-City Radio, Inc., et al.*, 16 Fed. Supp. 659, 660, 32 U. S. P. Q. 69 (D. C. S. D. N. Y.).

The trademark "Yale" established for flashlights and batteries could not be extended to other things to claim infringement.

> "Since the plaintiff has used the word upon nothing but flash-lights and batteries, and so far as appears does not mean to do more, the defendant needs no further protection."
>
> *Yale Electric Corporation v. Robertson*, 26 F. 2d 972, 974 (C. C. A. 2).

> "The exclusive right to use the mark should be limited to use on the class of goods for which it was registered, as set forth in the statement filed, and to merchandise of substantially the same descriptive properties."
>
> *Walgreen Drug Stores v. Obear-Nester Glass Co.*, 113 F. 2d 956, 960 (C. C. A. 8).

POINT 7. There Is No Unfair Competition.

(a) No Competition in Fact Exists and This Should be Considered.

Plaintiff is in the market manufacturing and selling electric appliances. Almost nothing other than electric appliances are sold. These are sold on a performance basis.

On the contrary, Defendant is in the business of selling nothing other than household furniture. It sells no appliances. Furniture is sold in one department and appliances in a separate department in stores where both are carried. They are not confused nor sold under the same circumstances. They are not sold by the same sales persons. Further than this Defendant's products are sold only to a restricted clientele, purchasers at wholesale. When the goods are sold at retail, Defendant's identity is completely obliterated. *Defendant's stock in trade is a wholesaler's service,* the maintenance of a warehouse of goods in California for the convenience of California retail merchants. Sale of merchandise in this fashion and especially furniture, could not conceivably compete unfairly with the retail sale of electrical appliances. If the Plaintiff were successful in this action he could turn to any business whatsoever using the name SUNBEAM and if there were but a single electric item of any nature could sue the business for unfair competition with reasonable prospect of success.

(b) Good Will Attaching to Plaintiff's Products Is of No Value to Defendant Who Sells Only a Special Service.

The good will of the Plaintiff, and good will is not challenged, is of no benefit to the Defendant in the kind of business Defendant transacts. Plaintiff's good will depends upon association of electrical appliances with the SUNBEAM name. Defendant's good will is attached to prompt and efficient service to retail merchants by having available for them a great variety of household furniture which they can purchase at wholesale when there is a demand. There is no confusion of origin or of goods. No customer of the Defendant would do business with Defendant unless he knew the Defendant's ability to supply the customer with furniture of the sort requested.

(c) Defendant's Customers and Trade Are Never Confused as to Origin of Defendant's Goods.

No customer of Defendant purchases appliances from Defendant. There could not conceivably be any confusion of origin if Defendant's customers go to the source or origin of the goods which they want and make certain that the source or origin is the Defendant and no one else. They buy only goods which they know, and from a source which they know. None are deceived into believing that Defendant has any identity with Plaintiff.

It has been established that the law of trademarks is no more than a part of the law of unfair competition. The law of unfair competition is bottomed on the conception of the defendant trading upon the good will of the Plaintiff.

It is not inequitable to share good will. Where confusion is avoided there is no unfair competition.

> "There is no evidence of passing off or deception on the part of the Kellogg Company; and it has taken every reasonable precaution to prevent confusion or the practice of deception in the sale of its product."
>
> *Kellogg Co. v. National Biscuit Co.,* 305 U. S. 111, 83 L. Ed. 73, 80.

The above is a reiteration of what has long been the law.

> "The only real controversy presented by the evidence is whether or not the defendants have been guilty of unfair competition, by attempting to palm off on the purchasers of silverware, as of the manufacture of complainant, that which in fact was of a different manufacture."
>
> *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co.,* 92 Fed. 774, 775.

> "'A court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other.' By the court in McLean v. Fleming, 96 U. S. 245, 255, 24 L. Ed. 828."
>
> *Caigan v. Plibrico Jointless Firebrick Co.,* 65 F. 2d 849, 851 (C. C. A. 1).

> "Defendant's activities have been confined to a field entirely isolated from that occupied by plaintiff. Being in two entirely different fields of activity there can be no confusion of source of origin."
>
> *Philco Corporation v. F. & B. Mfg. Co., supra,* citing from page 962.

The principles of trademark infringement and unfair competition herein set forth and supported by authority are in conformance with the law of unfair competition as it is interpreted by the California courts and reflected in the Federal court decisions in this circuit.

The California cases where unfair competition was held to apply can all be distinguished. In *Modesto Creamery v. Stanislaus Creamery,* 168 Cal. 289, the word "Modesto" was used on the identical goods in each case.

In *Sunmaid Raisin v. Mosesian,* 84 Cal. App. 485, both products were raisins and the marks were similar.

In *Wood v. Peffer,* 55 Cal. App. 2d 115, the goods were both refrigerators and the marks the same.

In *Winfield v. Charles,* 77 Cal. App. 2d 64, there was a deliberate overt act of unfair competition. Actual confusion was flagrant and repeated.

In *Brooks Bros. v. Brooks Clothing of California,* 60 Fed. Supp. 442, the goods were identical, namely, men's clothing.

In *Lane Bryant, Inc. v. Maternity Lane Limited of California,* 173 F. 2d 559, the goods were identical and the marks similar.

In *Stork Restaurant v. Sahati,* 166 F. 2d 348, the marks were fanciful and the case hinged on that. The same rule applied in *Safeway Stores v. Dunnell,* 172 F. 2d 649.

It is clear therefore that in accordance with the authorities followed by this circuit the facts in evidence do not show either that there is trademark infringement or that there is unfair competition.

The Argument Condensed.

From all of the foregoing facts it appears that the Plaintiff has an established trademark for use on electrical appliances. The Defendant is entitled to its own good will which it has established as a wholesaler of furniture of which lamps are part and parcel.

Plaintiff has seized upon the fact that there is a socket, cord and plug for electricity in a lamp and has based its entire case on that point. It has used that insignificant and immaterial circumstance to bring privation upon this Defendant forcing him to a burdensome defense of his good will in a business totally unrelated to Plaintiff's electrical business. No trademark infringement has been shown. No unfair competition has been pointed to. No likelihood of confusion is at all apparent. The prevailing authorities are in full accord with these contentions.

POINT 8. The Trial Court's Findings Have No Basis in Fact, and Its Conclusions Are Erroneous.

The portions of the evidence which are material to this issue have been discussed at length. They point clearly to errors of the trial court already enumerated in this brief. That those errors are fatal and beyond dispute is clearly evidenced when the record is examined in the light of the prevailing law. Since the conclusions of law are based upon findings which are in error, and since the conclusions failed to take into consideration findings which were omitted, the conclusions are groundless and the judgment wrongs the Defendant. This wrong should be rectified by the court of appellate jurisdiction.

POINT 9. The Judgment Exceeds the Proof and Is in Error.

Plaintiff in its prayer for relief seeks an injunction against the use of the word SUNBEAM as a brand name or trademark for electrical goods. It also seeks an injunction against the doing of any acts calculated to induce the belief that the Defendant is in any way connected with the Plaintiff.

Plaintiff has not established its trademark broadly on electrical goods. Plaintiff has established its trademark only on electrical appliances. Decorative lamps are not appliances. Defendant's only electrical items are decorative lamps. Therefore Defendant should not be enjoined from using its own name or the mark SUNBEAM as a tradename or trademark in any guise whatever on decorative lamps nor upon furniture.

Nowhere in the evidence is there any instance of Defendant doing any act to induce anyone that Defendant is connected with Plaintiff or its products. The injunction in this respect therefore is superfluous. It is, on the other hand, misleading and implies that what Defendant has been doing in the past is enjoinable. This is error and should be reversed.

Conclusion.

As has been pointed out specifically herein the proof does not support the judgment of the trial court. Interpretation by the trial judge of the proven facts in the light of the prevailing law in this circuit is in error. The judgment should therefore be reversed in its entirety and the complaint dismissed with costs to the Defendant.

Respectfully submitted,

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In the

United States Court of Appeals

For the Ninth Circuit

No. 12,628

SUNBEAM FURNITURE CORP., a corporation, ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, individuals doing business as SUNBEAM FURNITURE SALES CO., *Appellants,* *vs.* SUNBEAM CORPORATION, a corporation, *Appellee.*	Appeal from the United States District Court, Southern District of California, Central Division. Honorable **Leon R. Yankwich,** Judge Presiding.

BRIEF FOR PLAINTIFF-APPELLEE.

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BRIEF FOR PLAINTIFF-APPELLEE.

Appellants will hereinafter be referred to as defendants and appellee as plaintiff.

JURISDICTION.

Plaintiff concurs with defendants' statements as to jurisdiction as they appear at page one of their Opening Brief but cites additionally the United States Trade-Mark Act, (Title 15 U. S. C. Sections 1051 through 1127).

STATEMENT OF THE CASE.

A. The Facts.

Plaintiff is a well known manufacturer of various household electrical goods ranging from shavers to coffee makers. Since 1921 it has applied to its products its federally registered trade-mark SUNBEAM and has sold such household electrical products throughout the United States and in many foreign countries. It has engaged in the manufacture and sale of electrical products since 1912. Through the years since 1921 it has registered its trade-mark SUNBEAM in the United States Patent Office for its numerous household electrical products as seen in Exhibits B-1 through B-18 attached to its Amended Complaint (R. 28). In 1946 plaintiff changed its corporate name from Chicago Flexible Shaft Company to Sunbeam Corporation. Actually it had been known by the trade and public as SUNBEAM for many years (See Plf's. Ex. 4, R. 107).

The defendants, Sunbeam Furniture Corp., and its Secretary-Treasurer and General Manager, Melvin R. Luster, conduct a wholesale furniture business in Los Angeles, California and neighboring states and communities (R. 205). Part of their business is devoted to the sale of household electric lamps. Defendants claim to have commenced use of SUNBEAM sometime in 1942, about twenty-one years subsequent to its adoption by plaintiff. Defendants' business includes, along with lamps, the wholesale distribution of various items of furniture such as sofas, chairs, tables, and dinette sets which they obtain from manufacturers and which they resell to retail outlets.

In 1946, soon after learning of defendants' operations,

plaintiff called upon them to discontinue their use of SUNBEAM. Following their refusal this action was filed, and Expert Lamps Inc., an Illinois corporation operated in Chicago, and Arthur M. Luster, its president and president of defendant Sunbeam Furniture Corp., were included in the parties named. Arthur M. Luster is the father of defendant Melvin R. Luster and the principal owner of both Expert Lamps, Inc. and Sunbeam Furniture Corp. When it appeared that actual service on Expert Lamps, Inc. or Arthur M. Luster could not be obtained in the Southern District of California, an agreed order was entered quashing service of process on these parties, and an amended complaint omitting them as parties defendant was later filed.

After full trial, during which the validity of plaintiff's rights in its registered trade-mark SUNBEAM were not questioned, the District Court, in accordance with its findings of actual confusion (Finding 31, R. 70) and the likelihood of future confusion (Finding 30, R. 70), and the presence of intent to compete unfairly and to infringe, entered judgment for the plaintiff and enjoined defendants' further sale of lamps bearing the trade-mark SUNBEAM and further use of SUNBEAM in connection with their business. Plaintiff waived damages.

B. The Issues.

The basic issues involved here are:

1. Does defendants' advertising and sale of household electric lamps bearing the trade-mark SUNBEAM result in likelihood of confusion with plaintiff and thus in infringement of plaintiff's federally registered trade-mark SUNBEAM and in unfair competition with plaintiff?

2. Does defendants' use of SUNBEAM in their corporate names or business styles constitute infringement of plaintiff's federally registered trade-mark SUNBEAM and unfair competition with plaintiff?

SUMMARY OF ARGUMENT.

I. Plaintiff proved the necessary elements of infringement and unfair competition.

a. Plaintiff's proof.

b. Defendants' proof.

II. Defendants' actions constitute trade-mark infringement and unfair competition.

a. The statute.

b. The common law.

III. Middle-men are liable in an action for trade-mark infringement or unfair competition.

IV. The arguments of defendants' brief are unavailing.

a. Distinction between this action and *Sunbeam Lighting Co. et al.* v. *Sunbeam Corporation,* 183 F. (2d) 969 (C. A. 9, 1950).

b. Defendants' other claims and arguments are irrelevant.

c. Plaintiff's public reaction test evidence is admissible and reliable.

ARGUMENT.

Defendants' brief amounts to a prolonged series of minor efforts to exaggerate the claims and distort the facts and law of this action. Its theory seems to be that "little strokes fell great oaks". Yet were any doubts thus engendered, a re-reading of the learned opinion of the trial court dispels them, and an examination of the record ratifies the assurance thus had.

Defendants deal in household lamps which bear the trade-mark SUNBEAM while using SUNBEAM as the identifying portion of their trade-name. The record confirms that these acts induce a false association of defendants' goods and business with plaintiff. The federal statute and the common law justly direct that, where such confusion is even likely, its cause should be enjoined. The decree of the District Court protected plaintiff's individual commercial identity from defendants' forgery. That such action was the only lawful and conscionable course available will be demonstrated below.

I.

PLAINTIFF PROVED THE NECESSARY ELEMENTS OF INFRINGEMENT AND UNFAIR COMPETITION.

As stated by the trial court, there is no real contradiction in the evidence of the parties.[1] The proofs are summarized as follows:

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1. "The evidence offered on the part of the defendant does not, in reality, contradict the evidence of the plaintiff. All we have is the testimony of the defendant Melvin Luster and one of his salesmen, to the effect that no confusion has ever been called to their attention." (Opinion, R. 59.)

(a) Plaintiff's Proof.

1. Prior use and registration of SUNBEAM:
   Ploner (R. 101).

2. Extent of plaintiff's use and advertising of SUNBEAM:
   Ploner (R. 104).

3. Secondary meaning of SUNBEAM indicating plaintiff:
   Ploner (R. 105),
   Garriott (R. 171),
   Wallick (R. 179),
   Strandstra (R. 184),
   Wilson (R. 314),
   Brandenburg (R. 330),
   Hampshire (R. 332),
   Fitzhugh (R. 333),
   Rhodes (R. 334),
   Saunders (R. 334),
   Mercer (R. 334),
   Lovin (R. 334),
   Nickelson (R. 334).

4. Nature of defendants' use of SUNBEAM:
   Enfield (R. 336),
   Gibson (R. 325),
   Wilson (R. 315).

5. Results of defendants' use of SUNBEAM—confusion or passing off:
   Garriott (R. 172),
   Gibson (R. 325-326).

6. Household lamps sold in outlets selling plaintiff's products:
   Ploner (R. 112),
   Garriott (R. 170),
   Strandstra (R. 182),
   Wallick (R. 181),
   Wilson (R. 315).

7. Likelihood of confusion—reaction tests demonstrating reaction of consuming public to lamp sold by defendants bearing trade-mark SUNBEAM:

    Enfield (R. 335),
    Trotman (R. 362-366),
    Ives (R. 369),
    Algyer (R. 372),
    Lampa (R. 376-383),
    Sahl (R. 389-391),
    Still (R. 393-394).

8. Family relationship of defendants:

    Arthur M. Luster deposition (R. 268-290).

Through the testimony of its vice-president, plaintiff proved its nationwide use and enormous advertising of SUNBEAM since 1921 as its trade-mark for its numerous and varied household electrical products. It proved ownership and validity of its eighteen federal registrations of SUNBEAM recited in its Amended Complaint. It proved, by the testimony of members of the public and trade witnesses, its reputation for superior quality merchandise and that its connecting link to the resulting immensely valuable good-will lies in the word SUNBEAM. It similarly proved that SUNBEAM has acquired, long prior to its appropriation by defendants, a secondary meaning signifying, in the household electrical field, plaintiff and plaintiff's products only.

It demonstrated that defendant sells SUNBEAM lamps purchased from the other family-owned corporation; that all of defendants' advertising and promotional material as well as its store front emphasize the word SUNBEAM above all else and consistently treat it as a means for identification (See Plf's. Exhibits 15, 22, 23).

The record also shows that confusion as to the source of a lamp sold by defendants arose from their use of SUN-

beam as a trade-mark (R. 172), and that a retail salesman was either himself misled or was encouraged by the use of Sunbeam to "pass off" the merchandise on plaintiff's reputation (R. 325). It is likewise clear that both plaintiff's and defendants' Sunbeam products are customarily sold by the same kinds of retail outlets, *i. e.*, furniture and electrical appliance stores.

On the all-important question of likelihood of confusion, plaintiff has not relied on mere speculation and argument, but has offered two scientifically prepared and completely authenticated consumer reaction tests, conducted at an interval of almost two years and demonstrating that confusion of defendants' and their Sunbeam lamps with plaintiff and its Sunbeam products is inevitable.

The first test was made during March and April of 1948. A photograph of a Sunbeam lamp was shown to fifteen-hundred persons in middle income Los Angeles areas. They were asked whether they had ever bought or seen such a lamp and also to name any product or products they might know of that were put out by the same concern. Fifty-one percent, or 766 persons, associated the lamp with Sunbeam Corporation or its products. (R. 376-396.)

The second test was made just before trial and was also conducted in Los Angeles middle income areas. It was similar to the first except that the interviewees were shown a photograph of a Sunbeam lamp and also an actual specimen of the lamp label bearing the Sunbeam trade-mark. In this test fifty-six percent of the persons interviewed indicated confusion between the Sunbeam lamp and the plaintiff or its products.

In offering both tests, all of the original interview sheets were before the court for examination. Sample books of these sheets are in evidence (Plf's. Exhibits 11, 12, 13). With but one exception all personnel who conducted the

tests testified at the trial as to their work, its honesty and accuracy. As an added precaution for accuracy in the second test, the girls hired to take the interviews were not even advised of the purpose of their work or for whom the tests were being made.

The interlocking family relationship between the two defendants Melvin R. Luster and Sunbeam Furniture Corp., and Expert Lamps, Inc., and Arthur M. Luster, the father of Melvin and the president and principal stock holder of both corporations, is best disclosed by examination of the discovery deposition of Arthur M. Luster, taken in Chicago, Illinois, and, at the suggestion of the court, read into the record at the trial (R. 271). The senior Luster stated therein that defendant Sunbeam Furniture Corp. (of which he is president) sold no lamps bearing the trade-mark "Sunbeam" (Rec. 284, 285, 286) nor any goods in a carton with the word SUNBEAM printed thereon (R. 286). Yet the entire record of the trial, including the testimony of his son, demonstrates that the above statements were untrue (R. 247, 316).

(b) Defendants' Proof.

1. Nature of defendants' business and use made of Sunbeam:

   Luster (R. 205).

2. No knowledge of confusion with plaintiff:

   Luster (R. 251),
   Ain (R. 263),
   Wolfe (R. 199).

Defendants' efforts were almost wholly directed to showing that they are a wholesale concern and that they deal only with the ultimate consumer when customers are referred to their show rooms by their retail accounts. It appeared, however, that the reference of such customers is encouraged and indeed solicited by defendants (R. 362).

Testimony was also offered to show that the preponderance of defendants' business was in non-electrical items of household furnishings, and that no instance of confusion with plaintiff had ever come to the attention of defendant Melvin R. Luster, or two of his salesmen. These three were defendants' only witnesses.

II.

PLAINTIFF'S TRADE-MARK SUNBEAM IS INFRINGED.

(a) The Statute.

> "Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided, except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers." (Trade Mark Act of 1946, 15 U. S. C. 1051-1127, 1114 (Sec. 32(1).)

Since there is no question that defendants use Sunbeam as specified in the Act in connection with the sale and advertising of their goods or services, there only remains the question of likelihood of confusion. That confusion is likely can almost be inferred, since defendants sell such

closely related goods under the same mark while featuring it, moreover, in their corporate name and business style. The question of likelihood of confusion is one of fact, the essence of which is the state of mind of the public at large:

> *The Albert Dickinson Company* v. *Mellos Peanut Company of Illinois, Inc.*, 179 F. (2d) 265, 269 (C. A. 7, 1950).
>
> *Coca-Cola Co.* v. *Snow Crest Beverages, Inc.*, 162 F. (2d) 280, 283 (C. C. A. 1, 1947).
>
> *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 529 (1924).

SUNBEAM has become almost universally known to the trade and public as denoting plaintiff in the field of household electrical goods (R. 171, 184, 179). SUNBEAM household electric lamps sold and distributed by SUNBEAM (see Plf's. Ex's. 1, 7, 8 and Def's. Ex. FF) can only mean the plaintiff to most of those who may encounter them.

Even under the language of the repealed Trade Mark Act of 1905,[2] which required that infringing use must involve a confusingly similar mark in connection with goods of "substantially the same descriptive properties", plaintiff would be entitled to the relief granted. Household electric lamps and plaintiff's various household electrical products (recited in the registrations listed in its amended complaint, R. 31-32) are manifestly goods of the same descrip-

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2. "That the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable * * *"

(United States Trade-Mark Act of February 20, 1905, 15 U. S. C. Section 96 (Repealed July 6, 1946).)

tive properties. Direct competition has long since ceased to be a necessary element for unfair competition. Such an argument:

> "* * * is an unreal cleavage of the business, especially in this Circuit where the right to a trademark or tradename will be protected even in absence of competition.[39] Moreover, the doctrine does not find approval in other circuits and is condemned by The Restatement of Torts, which states emphatically that protection will be afforded even in the case of noncompetitive goods, businesses and services, where, because of prior use, 'Confusion of source may result.' "[40] *Brooks Bros.* v. *Brooks Clothing of California, Limited,* 60 F. Supp. 442, 459, 460. (Adopted and affirmed, 158 F. (2d) 798 (C. C. A. 9, 1947).

To the same effect is the leading case of *Safeway Stores, Inc.* v. *Dunnell,* 172 F. (2d) 649 (C. A. 9, 1949), wherein it is stated at page 656:

> "Even assuming the absence of any competition of toilet tissues and Dunnell's covers for protection of toilet users, Stores is entitled to its injunction. The principle is well stated in Judge Learned Hand's opinion in *Yale Electric Corporation* v. *Robertson,* 2 Cir., 26 F. 2d 972, at page 974, 'However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful.' "

The Congress, seeking to preclude the inequities which sometimes arose from the language of the earlier statute, and to afford protection in terms of the business necessities of a national-market economy, as well as according to the dictates of decent commercial ethics, specifically deleted the artificial requirement that the parties' goods must be "of the same descriptive properties" and directed that only a "likelihood of confusion" need exist to support the injunctive relief prescribed. In so doing it merely conformed the language of the new Act to the broadening interpretation found in the better considered opinions of the courts.[3]

The record, summarized above, leaves no doubt that, to a large portion of those who may encounter it, the sale of Sunbeam lamps by a Sunbeam company spells plaintiff or plaintiff's products. Thus, likelihood of confusion exists, and under the precise language of the federal statute defendants have infringed.

(b) The Common Law.

Likewise, under the common law, defendants must be found to have infringed, for here also likelihood of confusion is the test, and the absence of direct competition is no excuse. The leading California case of *Winfield* v. *Charles,* 77 C. A. (2d) 64, 175 P. (2d) 69 (1946), states that:

> "It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the

3. In the case of the *LaTouraine Coffee Co., Inc.* v. *Lorraine Coffee Company, Inc., et al.*, 157 F. (2d) 115 (C. A. 2, 1946), Judge Clark, writing the majority opinion, stated at page 118:

> "Be that as it may, Congress has shown its continued interest in trade-mark protection by the comprehensive new codification of trade-mark law embodied in the Trade Mark Act of July 5, 1946, which not merely amplified the Act of 1905, 15 U. S. C. A. Sec. 81, *et seq.*, but gave to this property right a legislative standing it had not had before. Derenberg, Trade-Marks Ante Portas, 52 Yale L. J. 829, 830. We should hesitate to go against so clearly expressed a legislative intent for only some remote fears of our own of social disaster to result from grant of the statutory protection. The new statute affords relief for a 'colorable imitation' where use is 'likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods,' Sec. 32 (1) (a), Act of July 5, 1946."

likelihood of deception which the remedy may be invoked to prevent * * * 'It is sufficient if injury to the plaintiff's business is threatened, or imminent, to authorize the court to intervene to prevent its occurrence.' (*Sun Maid Raisin Growers* v. *Mosesian*, 84 Cal. App. 485, 497)."

Correspondingly, in the case of *Academy of Motion Picture Arts and Sciences* v. *Benson*, 15 Cal. (2d) 685, 689, 104 P. (2d) 650, 652 (1940), the Supreme Court of California said:

> "The decisions of the courts for the most part are concerned with the principles applicable to infringement and unfair competition in respect to businesses which are directly competitive. But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in noncompetitive businesses it has been held that *where confusion was shown as likely to result the relief should be accorded to the complaining party.*" (Emphasis ours.)

Among the numerous California cases enunciating the same general rules are the following:

Wood v. *Peffer*, 55 C. A. (2d) 116, 122, 130 P. (2d) 220 (1942);

Eastern Columbia, Inc. v. *Waldman*, 30 Cal. (2d) 268, 181 P. (2d) 865 (1947);

Weatherford et ux. v. *Eytchison et al.*, 202 P. (2d) 1040, 90 Cal. (2d) 379 (1949);

Hoover Co. v. *Groger et al.*, 12 Cal. App. (2d) 417, 55 P. (2d) 529;

Derringer v. *A. J. Plate*, 29 Cal. 292 (1865).

And similarly are the federal cases such as:

Del Monte Special Food Company v. *California Packing Corporation*, 34 F. (2d) 774, 775.

Stork Restaurant v. *Sahati,* 166 F. (2d) 348 (C. A. 9, 1948).

Lane Bryant, Inc. v. *Maternity Lane Limited of California,* 173 F. (2d) 559 (C. A. 9, 1949).

Brooks Bros. v. *Brooks Clothing of California, Limited,* 60 F. Supp. 442, (adopted and affirmed, 158 F. (2d) 798 (1947)).

Horlick's Malted Milk Corporation v. *Horluck's, Inc.,* 59 F. (2d) 13, 15 (C. C. A. 9, 1932).

As to the protection to be accorded uninvented trade marks which have acquired a meritorious distinctiveness or secondary meaning, the law of California was stated by Justice Carter in *Eastern Columbia, Inc.* v. *Waldman,* 30 Cal. (2d) 268, 181 P. (2d) 865 (1947). At page 867 he said:

> "It is asserted by defendant that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a 'secondary meaning' as distinguished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right."

That the rule in the federal courts corresponds, is revealed in *Wisconsin Electric Co.* v. *Dumore Co.,* 35 F. (2d) 555, (C. C. A. 6, 1929). At page 557 Judge Hicks stated:

"Prima facie there is no fraud or misrepresentation in using as a mark upon his goods any word one chooses, even though another dealer in the same line has already adopted it. This is so because, ordinarily, all have equal rights in the use of language, but, if through its long use as applicable to a particular product or business a word has come to have a 'secondary meaning,' he who has thus adopted it is entitled to protection."

Innumerable citations to the same effect concerning both the statute and the common law could be listed but only to illustrate that this court and those of California have long been the vanguard in the maintenance of respectable standards for the protection of individual commercial identity, and that the other jurisdictions have followed closely their lead.

III.

MIDDLE-MEN OR DISTRIBUTORS ARE LIABLE IN AN ACTION FOR TRADE-MARK INFRINGEMENT.

From defendants' brief one would imply that their position as a mere "middle-man" or distributor grants them sanctuary from plaintiff's claims. But the law is neither crippled by such insulating devices nor does it thus excuse infringement or unfair competition. Their claim actually amounts to no more than a re-phrasing of the oft' refuted effort to argue that no unfair competition may exist where there is no competition.

Defendants here are in the nature of joint tort feasors in so far as they call themselves SUNBEAM and deal in lamps bearing the trade-mark SUNBEAM. Even if ignoring the interlocking family business relationship or the dealings with retail customers in their show-rooms, they are direct participants in the infringement of plaintiff's registrations

and in the fraud thus perpetrated upon the trade and public.

The law is well stated in the *American Law Institute Restatement of the Law of Torts,* Chapter 35, Section 734, as follows:

> "*Infringement in Different Stages of Distribution.*"
>
> "One infringes another's trade-mark or trade name, under the rule stated in Sec. 717, whether he uses his designation in the same stage of the process of distribution as that in which the other uses his trade-mark or trade name or in a different stage, and whether he is the initial or a subsequent distributor of the goods or services denominated by the designation.
>
> "*Comment:*
>
> "a. *Same or different stage of marketing process.* The rule stated in this Section is corollary to the rules stated in Secs. 728 and 730. Direct competition between the person having the trade-mark or trade name and the alleged infringer, either with respect to the type of goods which they market or with respect to the stage in the process of distribution which they occupy, is not an essential condition of liability for the infringement of trade-mark or trade name. Just as one who markets only maple syrup may infringe the trade-mark of another who markets only pancake flour, so also may one who sells only to wholesalers infringe the trade-mark of another who sells only to retailers or only to ultimate consumers. The possibilities of harm to the person having the trade-mark or trade name are similar whether the confusion or deception is caused at one step or another in the marketing process. Moreover, marketing processes are constantly changing. One who sells only to retailers today may begin to sell to wholesalers or direct to consumers tomorrow. Or, though continuing to market through the same channels, he may advertise in all channels. The difference in the classes of persons who purchase the goods of the two parties may, however, be a factor on the issues of confusing similarity (Secs. 728 and 729) or the extent of protection with refer-

ence to the kind of goods, services or business (Secs. 730 and 731) or the practicability of limited protection under the rule stated in Sec. 735.

"b. *Initial or subsequent distributors.* A middleman infringes a trade-mark under the same conditions as the manufacturer. It is immaterial that the actor is not the manufacturer, or that the claimed infringing designation was placed upon the goods by some third person. It is sufficient to constitute infringement that the actor markets the goods under the conditions stated in Sec. 717. Compare Sec. 714; Sec. 727, Comment b; and Sec. 728, Comment c.

"Illustration:

"1. A uses the trade-mark 'Zerex'. B subsequently manufactures goods, affixes the same designation to them and sells them to C, a wholesaler, who sells them to D a retailer, who sells them to ultimate purchasers. Under the conditions stated in Sec. 717, B, C and D infringe A's trade-mark."

The law of California is disclosed in *American Philatelic Society* v. *Claibourne,* 3 Cal. (2d) 689, 46 P. (2d) 135, a case in which the defendant was, as here, a wholesaler. At page 697, Judge Curtis said:

"So, likewise, it is immaterial to the charge of unfair competition that the respondent made no attempt to deceive the retail dealers and in fact frankly stated to them the true facts, that the stamps were unofficially separated. There is an abundance of cases recognizing and setting forth the well-settled rule that it is of no consequence in a charge of unfair competition that no deception is practiced on the retail dealers and they know exactly what they are getting; that the wrong lies in designedly enabling the dealer to palm off the copy or simulated article as that of the complainant. (*Von Mumm* v. *Frash,* 56 F. 830, 834; *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526; see 84 A. L. R., annotation, pp. 486, 487.)"

In *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.,* 118 F. 657 (1902), Judge Morrow, speaking for the Circuit Court of the United States for the Northern District of California, stated the same rule as the law of that Circuit. At page 661, he said:

> "It may be conceded that the defendant never, by any of its officers or agents, intimated to its salesmen that they should recommend the defendant's packages as being readily disposed of to consumers who asked for and wished to have complainants. But such oral commendation was certainly unnecessary. A survey of the two packages, placed side by side, would sufficiently suggest this possibility to a dishonest dealer. We have, then, the case of a manufacturer who is careful always to sell its goods as its own, but who puts them up in a style of package so similar to that used by one of its competitors, earlier in the market, that unscrupulous dealers, who purchase from the manufacturer in order to sell at retail to consumers, are enabled to delude a large number of such retail purchasers by palming off upon them the goods of the manufacturer as those of its competitor. That this is unfair competition seems apparent, both on reason and authority."

Mr. Justice Brandeis, speaking for the Supreme Court in *Federal Trade Commission* v. *Winsted Hosiery Company,* 258 U. S. 483 (1922), stated the following at page 494:

> "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.[1] And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby.[2]
>
> [Footnotes:]
>
> 1. *Von Mumm* v. *Frash,* 56 Fed. 830; *Coca Cola Co.* v. *Gay-Ola Co.,* 200 Fed. 720, 722; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.,* 168 Mass. 154, 155.

2. *Manhattan Medicine Co.* v. *Wood,* 180 U. S. 218; *Worden* v. *California Fig Syrup Co.,* 187 U. S. 516, 538.''

To the same effect is *William R. Warner & Co.* v. *Eli Lilly & Co.,* 265 U. S. 526, 530, 44 S. Ct. 615, 617 (1924).

In *Saratoga Vichy Spring Co.* v. *Saratoga Carlsbad Corporation, et al.,* 45 F. Supp. 260 (D. C. S. D. N. Y., 1942), Judge Conger said, at page 261:

> ''If plaintiff is correct in its contention here as to the charges of infringement and unfair competition, it is no defense, that the defendants are merely sellers or wholesalers or distributors and not the original bottler or manufacturer. *Hansen* v. *Seigel-Cooper Co., et al., C. C.,* 106 F. 690; *Pro-phy-lac-tic Brush Co.* v. *Abraham & Straus, Inc.,* D. C. 11 F. Supp. 660.''

Among the many decisions to the same effect are:

Saxlehner v. *Siegel-Cooper Company,* 179 U. S. 42 (1900);

Frischer & Co., Inc., et al. v. *Bakelite Corporation, et al.,* 39 F. (2d) 247 (C. C. P. A., 1930);

Chesebrough Mfg. Co. v. *Old Gold Chemical Co.,* 70 F. (2d) 383 (C. C. A. 6, 1934);

F. W. Fitch Co. v. *Camille, Inc.,* 106 F. (2d) 635 (C. C. A. 8, 1939);

Grocers Banking Co. v. *Sigler,* 132 F. (2d) 498 (C. C. A. 6, 1942).

The clear language of the statute does not except middlemen from liability. By analogy, it is noteworthy that the Act specifically provides for enjoining even innocent infringers such as printers who print labels or advertising matter bearing infringing material.[4] Thus, even under

4. "Notwithstanding any other provision of this Act, the remedies given to the owner of the right infringed shall be limited as follows: (a) Where an infringer is engaged solely in the business of printing the mark for others and establishes that he was an innocent infringer the owner of the right infringed shall be entitled as against such infringer only to an injunction against future printing; * * *"

Trade-Mark Act of 1946, Section 32 (2), (15 U. S. C. 1114 (2).)

facts indicating no intent to infringe or compete unfairly, these defendants should be enjoined. In his text, *Unfair Competition and Trade-Marks,* 4th Ed., Mr. Harry Nims states at page 941:

> "Deception caused by sale of infringing goods, though directly attributable to the manufacturer or to the seller, may have been possible only through the aid of third persons. Some of the contributors to the damaging result may have acted intentionally—others without deliberate fraud. All share in the responsibility and all may be liable."

But where defendants are merely an adjunct of a family business, inter-related and interlocking in its operation, ownership and control (opinion below R. 59), and where the intent is obvious, to deny relief would be submission to a sham.[5]

IV.

THE ARGUMENTS OF DEFENDANTS' BRIEF ARE UNAVAILING.

(a) Distinction Between This Action and Sunbeam Lighting Co. et al. v. Sunbeam Corporation, 183 F. (2d) 969 (C. A. 9, 1950).

Defendants seek comfort from the above recent decision of this court involving the same plaintiff and its same trade-mark, SUNBEAM. Although plaintiff respectfully submits

5. Although intent to defraud is not a necessary element of trade-mark infringement, Judge Learned Hand has described its effect when present in *My-T Fine Corporation* v. *Samuels*, 69 F. (2d) 76, (C. C. A. 2, 1934) at page 77:

> "We need not say whether that intent is always a necessary element in such causes of suit; probably it originally was in federal courts. (Cit's.) But when it appears, we think that it has an important procedural result; a late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile. Prima facie the court will treat his opinion so disclosed as expert and will not assume that it was erroneous. (Cit's.) He may indeed succeed in showing that it was; that, however bad his purpose, it will fail in execution; if he does, he will win. *Kann* v. *Diamond Steel Co.*, 89 F. 706, 713 (C. C. A. 8). But such an intent raises a presumption that customers will be deceived."

that the decision therein unduly limited the relief granted in view of the proof of actual confusion, likelihood of confusion and broad secondary meaning; yet respecting portable lamps, the only goods complained of herein, this court found confusion likely and affirmed the judgment below accordingly. It commented at page 971 of its opinion:

> "We think the difference between electrical fluorescent lighting fixtures with the method of their marketing, the portable lamps and the way they are marketed puts the latter on sale in such a way as to cause confusion. The injunction should cover this item."

Moreover, the remainder of the above decision offers no escape for these defendants, since the instant action presents a wholly different array of operative facts. In the earlier case the defendants used SUNBEAM almost exclusively upon large industrial overhead fluorescent lighting installations. Here the goods are SUNBEAM household electric lamps. In the earlier case the greatest portion of the ultimate purchasers were skilled technicians or architects who could be presumed unlikely to be deceived. Here the ultimate purchasers are the public at large. In the prior case, it was claimed that the accused products bore only trade-name, not trade-mark, usage of SUNBEAM and that thus the specialized architect and technician clientele could hardly fail to distinguish. It was only by reliance upon such claims that this Court limited the relief granted below. Here there can be no such argument.

(b) Other Irrelevant Claims and Arguments.

The defendants' brief is largely emphasis by repetition of various obvious but irrelevant facts. Thus it appears that plaintiff does not make lamps, furniture (p. 14) or numerous other electrical items (p. 17); that plaintiff is not entitled to exclusive rights in the whole electrical, furniture and household equipment fields (p. 13, 36); that "Use of

a non-fanciful mark in a closely related field will not be enjoined *unless use would indicate a common origin*" (p. 12. emphasis ours); that lamps are not sold on the street (p. 29); that furniture, lamps and plaintiff's products are not, in some stores, displayed and sold in the same department (p. 15, 36); that lamps are but a part of defendants' business (p. 22); that a large part of defendants' business is wholesaling (p. 23, 36); and that the three witnesses defendant presented had not been confused and knew of no confusion (p. 26).

Yet it remains clear that the ultimate outlets for furniture, lamps, and plaintiff's products, are frequently the same; thus confusion is likely when the same mark is used on similar goods.

Although no one would confuse an electric lamp with an electric iron, or with any of plaintiff's other products, the test is not confusion of goods, but confusion of source. In *Wall* v. *Rolls-Royce of America, Inc.,* 4 F. (2d) 333 (C. C. A. 3, 1925), Judge Buffington said, at page 334:

> "It is true those companies made automobiles and aeroplanes, and Wall sold radio tubes, and no one could think, when he bought a radio tube, he was buying an automobile or an aeroplane. But that is not the test and gist of this case."

See also *Standard Brands, Inc.* v. *Smidler,* 151 F. (2d) 34, 37 (C. C. A. 2, 1945); *Radio Shack Corporation* v. *Radio Shack, Inc.,* 180 F. (2d) 200, 206 (C. A. 7, 1950).

Plaintiff claims a right to relief against certain of defendants' acts respecting certain of its goods, and no more. The common law and the statute provide for such relief, despite minor differences in goods, or that these goods are but a part of defendants' business. The question is not whether some of defendants' acts do not lead to confusion, but whether some do. It is only against the latter that plaintiff has sought relief.

Defendants argue that they are entitled to use "SUNBEAM" because it is "descriptive" of their goods; yet they never use it in its ordinary language or descriptive signification (to which plaintiff could not object). They use it, instead, solely in its identifying significance as a trade-mark and trade name.

As to trade-mark usages by third parties, it may be that SUNBEAM is used by some others on wholly dissimilar products; but, as defendants have admitted at page 12 of their brief concerning "weak" marks, "Use of a non-fanciful mark in a closely related field will not be enjoined *unless use would indicate a common origin*" (emphasis ours). Just as the defendants argue, likelihood of confusion, or an indication of "common origin," can exist even as to the "narrowest" of marks. In so much as a once "narrow" mark has acquired broad secondary meaning, that much enhanced is the likelihood of confusion which perhaps would otherwise be remote or narrowly confined due to the nature of the mark. It is a question of fact to be decided subjectively rather than objectively in each case. Plaintiff has demonstrated sufficient breadth of secondary meaning and likelihood of confusion here to overcome any claim of "narrowness."

As summarized in *Triangle Publications, Inc.* v. *Rohrlich et al.,* 167 F. (2d) 969, 972 (C. C. A. 2, 1948):

> "It is settled law that a plaintiff who has established a right to a trade name which is fanciful or arbitrary or has acquired a secondary meaning is entitled to protection of his reputation against the use of that name by others even upon non-competing goods, if the defendant's goods are likely to be thought to originate with the plaintiff."[6]

6. "The issue in each case is whether or not in fact a substantial number of present or prospective purchasers understand the designation, when used in connection with goods, services or a business, not in its primary lexicographical sense, but as referring to a particular person or association." *Restatement of the Law of Torts*, Vol. III, Sec. 716, p. 560.

(c) Plaintiff's Public Reaction Test Evidence Is Admissible and Reliable.

Plaintiff has offered two scientifically prepared and fully authenticated consumer reaction tests demonstrating that confusion of defendants' Sunbeam lamps with plaintiff and its products is inevitable. The facts establishing the reliability of the tests and their results have been discussed above. As stated by Wigmore ("Evidence," Vol. VI, sec. 1766, p. 177) and McKelvey ("Evidence," 1944, p. 390) and others, the answers to plaintiff's interview interrogations are not objectionable as hearsay. They are offered merely to indicate the state of mind of those interviewed. Among the decisions confirming their admissibility are: *S. C. Johnson & Son* v. *Johnson,* 28 F. Supp. 744, 749, affirmed on appeal (C. C. A. 2, 1940), 116 F. (2d) 427, 429; *Tillman & Bendel* v. *California Packing Corp.* (C. C. A. 9, 1933), 63 F. (2d) 498, 502; *Oneida, Ltd.* v. *National Silver Co.* (Sp. Ct., 1940), 25 N. Y. S. (2d) 271, 286. Defendants argue that the tests were made by door to door canvasses and by interviewing persons on the street where lamps are not sold. They also protest that a photograph of the defendants' lamp was used. In brief, they object that the reaction tests were tests and not actual sales of lamps. Plaintiff offered its tests as such, however, and believes it has demonstrated that they are of substantial probative and pragmatic significance. It submits that a more reliable presentation of the facts in issue here could not possibly be devised.

Conclusion.

Plaintiff's registrations of its trade-mark Sunbeam are admittedly valid. Sunbeam in the household electrical field has meant plaintiff since long prior to defendants' appropriation. That the sale by a Sunbeam concern of Sunbeam household electric lamps results in a likelihood of confusion and is a forgery inferring and implying an association with plaintiff is both proved and obvious. Defendants cannot avoid the powers of a court of equity, and thus the consequences of their acts, through their position as a middleman in an interlocking family business. Thus the judgment below was in accord with the federal statute and the law of this jurisdiction which protect both the public and plaintiff from the fraud and deception inherent in defendants' acts. Plaintiff asks that the judgment be affirmed.

Respectfully submitted,

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No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBEAM FURNITURE CORP., ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, doing business as SUNBEAM FURNITURE SALES CO.,

Appellant,

vs.

SUNBEAM CORPORATION,

Appellee.

APPEAL BY THE DEFENDANTS FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, IN A TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION ACTION.

APPELLANT'S CLOSING BRIEF.

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No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Sunbeam Furniture Corp., Arthur M. Luster, Melvin R. Luster and Frieda Luster, doing business as Sunbeam Furniture Sales Co.,

Appellant,

vs.

Sunbeam Corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

Further Statement of the Case.

Supplemental and Corrected Facts.

It is believed that it will be helpful for this court in reviewing the facts and the law to have before it a condensation of certain significant dates. These are the dates of first use of the trademark or tradename Sunbeam, namely:

Plaintiff	1921 [R. 5]
Expert Lamps	1925-1930 [R. 215]
Defendant	1942 [R. 205]

Other dates:

Plaintiff changed corporate name from Chicago Flexible Shaft to Sunbeam Corporation	1946 [R. 107]
First notice by plaintiff to defendant, this complaint filed	1948 [R. 11]

From the foregoing factual summary of dates based upon the record of evidence it becomes apparent that Expert Lamps, Inc., used the trademark SUNBEAM in its own business for decorative lamps for at least eighteen years before plaintiff took any notice of it or took any action. Moreover, defendant here was using SUNBEAM as a part of its corporate name either as Sunbeam Furniture Sales Co. or Sunbeam Furniture Corp. for six years before plaintiff took sufficient notice to call defendant's attention to its position.

Summary of Argument in Reply.

I. Four Significant points:

(a) Likelihood of confusion

(b) Unfair competition

(c) Trademark infringement

(d) Secondary meaning

II. Plaintiff's authorities on question of infringement distinguished.

III. Plaintiff's cases in support of common law holding of trademark infringement and unfair competition are distinguished.

IV. To hold middlemen or distributors liable there must be something more than handling the trademark of another.

(a) Pertinent sections of "Restatement"

(b) Sections of "Restatement" relied on by plaintiff not pertinent

(c) Plaintiff's authorities do not support middleman theory

V. Decision of *Sunbeam Lighting Co. et al. v. Sunbeam Corporation*, 183 F. 2d 969 supports defendant here; authorities are consistent.

VI. Plaintiff's public reaction test is the sole basis for charging defendant with liability.

(a) Record of evidence

(b) Plaintiff's authorities on question of reaction tests are unreliable

VII. The case against Expert Lamps, Inc.

VIII. Conclusion.

ARGUMENT IN REPLY.

I.

Four Significant Points.

Defendant's opening brief and plaintiff's answer thereto makes it apparent that the argument rests on four points:

(a) Likelihood of Confusion. The entire question of infringement and unfair competition rests solely and completely on likelihood of confusion. The sole supporting evidence consists of the public opinion surveys.

There are but two questionable instances of actual confusion [R. 172, 325-326].

Evidence produced by both plaintiff's witnesses and defendant's witnesses clearly shows no likelihood of confusion.

Plaintiff's witness Garriot [R. 174-175]
Plaintiff's witness Sandstra [R. 186]
Plaintiff's witness Sahl [R. 392]
Plaintiff's witness Wallick [R. 181]
Plaintiff's witness Ives [R. 370-371]
Plaintiff's witness Still [R. 395]
Defendant's witness Wolfe [R. 195]
Defendant's witness Luster [R. 251]
Defendant's witness Ain [R. 263].

(b) Unfair Competition. If there be any unfair competition it must be because defendant in its furniture business under the name Sunbeam Furniture Corp. distributes decorative lamps and shades as part of its line of furniture.

(c) Trademark Infringement. If there be any trademark infringement it must be because defendant

transships cartons of merchandise from Expert Lamps, Inc., upon which may possibly appear tags of Expert Lamps, Inc.

(d) Secondary Meaning. If plaintiff has established any secondary meaning it can mean nothing more than electrical appliances and cannot have reference to other electrical products wherever used. Consequently, Sunbeam is not plaintiff's trademark. Its trademark is Sunbeam for Electrical Appliances.

II.

Plaintiff's Authorities on Question of Infringement Distinguished.

Plaintiff correctly cites the portion of the statute concerning the Trademark Act of 1946 treating with infringement. The sole pertinent portion of the statute is with regard to use "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods."

Plaintiff's authorities relied upon to tie defendant's acts to the statute are clearly distinguished.

The Albert Dickinson Company v. Mellos Peanut Company of Illinois, Inc., 179 F. 2d 265, case relates to the term "Block Buster" for popcorn claimed to infringe "Big Buster" for popcorn. In this case the goods were *identical* The case turned on the propriety of a summary judgment.

Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F. 2d 280, is concerned with "Polar-Cola" held not to infringe "Coca-Cola". No unfair competition was found. The goods were *identical.* The names sound alike. Only their appearance was different.

In *William R. Warner & Co. v. Eli Lilly & Co.,* 265 U. S. 526, the question involved the sale of a later *identical* product at a much cheaper price by the same persons who sold a prior product which had acquired a large market. An injunction was issued solely to prevent the sale of the later product at a cheaper price.

III.

Plaintiff's Cases in Support of a Common Law Holding of Trademark Infringement and Unfair Competition Are Distinguished.

The California cases clearly do not support plaintiff's interpretation of them.

In *Winfield v. Charles,* 77 Cal. App. 2d 64, the defendant deliberately changed his name from Charles to Winfield and then moved his manufacturing business to a location within sight of plaintiff's manufacturing business. The defendant thereby placed himself in a position to trade upon plaintiff's reputation. Even in this case the court said:

> "No inflexible rule of law can be laid down as to what conduct will constitute unfair competition . . . Unfair competition is a question of fact . . ."

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, did not treat with trademark infringement but instead turned upon unfair competition. The test was as to whether the unfair practices of the defendant who changed her name to "The Hollywood Motion Picture Academy" would injure the originators of the term "Academy Award."

The cases *Stork Restaurant v. Sahati; Lane Bryant, Inc. v. Maternity Lane Limited of California; Brooks*

Bros. v. Brooks Clothing of California Limited; and Horlick's Malted Milk Corporation v. Horluck's, Inc., have already been distinguished in defendant's opening brief.

The case of *LaTouraine Coffee Co., Inc. v. Lorraine Coffee Company, Inc., et al.*, 157 F. 2d 115, appearing in plaintiff's brief, footnote 3, again was concerned with *identical* products, namely, coffee. In addition the trademarks selected had the same sound and eye appearance.

IV.

To Hold Middle-men or Distributors Liable There Must Be Something More Than Handling the Trademark of Another.

Plaintiff, faced with a scarcity of settled law on this question, has resorted to bald abstract statements from "American Law Institute Restatement of the Law of Torts."

The "Restatement," while academically correct, is no more a criterion of infringement than a similar bald statement selected from a recognized authority where the facts involved are different. The Restatement is even less dependable because it does not treat with real issues of fact but only supposititious circumstances.

Plaintiff seems misled into assuming that because there may be unfair competition without market competition, other tests may be disregarded. Unless there is clear proof of a trespass neither language of the "Restatement" nor decided cases is of consequence.

In referring to the "Restatement" other pertinent passages should be considered in addition to those selected and quoted by plaintiff. Plaintiff adapted SUNBEAM as a *tradename* long after defendant entered its own

field. Consequently the broader significance attaching to a tradename does not apply here. These passages of the "Restatement" are felt to be pertinent and significant:

(a) Pertinent Sections of "Restatement."

"Section 717(d).

LIMITATION AS TO GOODS AND MARKET. One who has a trademark or tradename does not have the exclusive right to use the designation even as a trademark or tradename. He has that exclusive right only within more or less restricted markets and with reference to more or less restricted kinds of goods, services or business.

"(f) PRIORITY IN TRADENAMES IS NOT OF THE SAME SIGNIFICANCE AS IN TRADEMARKS. A designation is a tradename only if, apart from other requirements, it has acquired a special significance as the name of the goods, services or business of one person.

"Section 730(b).

* * * * * * * *

The issue in each case is whether the goods, services or businesses of the actor and of the other are sufficiently related so that the alleged infringement would subject the good will and reputation of the other's trademark or tradename to the hazards of the actor's business. * * *

"Section 733(b).

FAILURE TO PREVENT SUBSEQUENT USE BY OTHERS. Failure by a prior user of a trademark or tradename to take effective steps to prevent subsequent use of a similar designation by another may narrow the class of goods or the territorial markets with reference to which his priority would otherwise entitle him to exclude others."

(b) Sections of "Restatement" Relied on by Plaintiff Not Pertinent.

Plaintiff's quoted selections from the "Restatement" are not applicable to the facts here in issue. Infringement in different stages of distribution does not relate to use by one of the trademark of someone else. The same comment applies to infringement in a different stage of the marketing process. In the last instance the difference in the class of persons who purchase the goods is a factor when considering issues of confusing similarity.

(c) Plaintiff's Authorities Do Not Support Middle-man Theory.

Among plaintiff's cited authorities is *American Philatelic Society v. Claibourne,* 3 Cal. 2d 689, wherein the products, stamps, were in fact *illegally* perforated to make them look like expensive genuine items. Those illegally constituted items were then offered to unscrupulous dealers. Judgment was predicated on simulation and imitation of *identical* goods for the very purpose of deceiving the unwary public.

Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657, treated with soap wherein the size, color and shape of the infringing package copied so closely plaintiff's package that the infringing label on *identical* goods was considered a counterfeit.

Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, turned upon the question of *flagrant misbranding* wool to suggest it being pure wool which it was not. The court held that to be unfair to those who marked similar goods honestly. This was a case of outright fraud deliberately practiced on *identical* goods.

In the case of *Saratoga Vichy Spring Co. v. Saratoga Carlsbad Corporation, et al.,* 45 Fed. Supp. 260, the facts showed defendant's labels actually simulating plaintiff's labels in form, arrangement, color and style of printing for *identical* goods. Flagrant copying was considered to obviate lack of proof of confusion.

In *Saxlehner v. Siegel-Cooper Company,* 179 U. S. 42 *identical* products were involved, namely, water. Defendants actually palmed off the infringing water as plaintiff's product. Labels so closely simulated plaintiff's labels as to make it possible.

In *Frischer & Co., Inc., et al. v. Bakelite Corporation, et al.,* 39 F. 2d 247, goods again were *identical.* What importers failed to do was to so distinctively mark imported goods that they could not be passed off by subsequent purchasers as the well-known domestic goods.

In *Chesebrough Mfg. Co. v. Old Gold Chemical Co.,* 70 F. 2d 383, the products were *identical,* namely, petroleum jelly, sold in transparent jars. The infringer's carton was substantially the same size, shape and color. The deceptive appearance was obvious. Several retailers openly sold one instead of the other.

In *F. W. Fitch Co. v. Camille, Inc.,* 106 F. 2d 635, the goods were *identical.* They were packaged alike. Defendant's display cards simulated those of the plaintiff and infringer's trademark "Stop-A-Run" closely resembled plaintiffs' trademark "Run-R-Stop." Flagrant copying

enabled the liability to be passed from the actor to the instigator.

Grocers Banking Co. v. Sigler, 132 F. 2d 498, concerned *identical* products, namely, bread, and identical tradenames such as "Hun-E-Krust" or "Honey-Krust" where even the design on the wrapper was copied and passing off was proven.

My-T Fine Corporation v. Samuels, 69 F. 2d 76, involved *identical* products, namely, pudding. Defendant's box was the same size and a virtual copy in design and color of plaintiff's box. Flagrant copying was the deciding factor.

Cases relied upon by the plaintiff to support liability of the middle-man evidence in every instance some flagrant or glaring breach of the common principles of decency and honesty relating in almost every instance to *identical products.*

The parties in the case at bar are two entirely separate and distinct businesses going their own way, using their own marks and not one real instance of actual confusion has been shown. The market appeal of the products is entirely different. The goods are entirely foreign to each other. They are linked only by a vague reference to electricity.

Defendant should not be enjoined from using SUNBEAM in the FURNITURE BUSINESS because decorative lamps are wired for electricity.

V.

Decision in Sunbeam Lighting Co., et al. v. Sunbeam Corporation, 183 F. 2d 969, Supports Defendant Here; Authorities Are Consistent.

Plaintiff refers to a subordinate portion of the opinion of this court where it refers to "the portable lamps and the way they are marketed (which) puts the latter on sale in such a way as to cause confusion." Plaintiff makes no mention of how those portable lamps were sold. How lamps are sold has as much bearing in the case at bar as it did in the other case where fluorescent lighting fixtures were sold in a manner different from the way plaintiff sold its appliances.

The furniture items comprising decorative table lamps here charged to infringe are sold in a fashion even further afield from the sale of plaintiff's appliances. The lamps are sold solely on eye appeal and because they need to match other household furniture and draperies, etc. They are not sold on electrical performance.

Plaintiff's authorities are only of a general character involving factual issues unrelated to the facts of the case at bar. Defendant's entire business is a wholesaling business. Its witnesses at trial were plaintiff's witnesses as well as its own. The testimony of both were in full support of defendant's position. It was unnecessary to crowd the record with a repetition of clear-cut facts by further witnesses of defendant's special selection.

When plaintiff relies upon *Wall v. Rolls-Royce of America, Inc.*, 4 F. 2d 333, again the facts show that the defendant in that case deceptively used only the name Rolls-Royce Tube Co. without identifying himself. De-

fendant misrepresented his address as "Department A, Rolls-Royce Tube Co."

In *Standard Brands, Inc. v. Smidler,* 151 F. 2d 34, an arbitrary and *fanciful* mark, namely, "V-8," was in issue, not a common mark such as SUNBEAM.

In *Radio Shack Corporation v. Radio Shack, Inc.,* 180 F. 2d 200, the corporations were in direct competition selling *identical* products. The wrong lay in realization by the defendant on plaintiff's reputation.

In *Triangle Publications, Inc. v. Rohrlich, et al.,* 167 F. 2d 969, an arbitrary and distinctive trademark was involved, namely, "Seventeen" for a magazine, extensively advertising young ladies' wear including girdles. The defendant then selected the same *fanciful* mark changed to "Miss Seventeen" for use on girdles and foundations of the same sort advertised in the magazine.

VI.

Plaintiff's Public Reaction Test Is the Sole Basis for Charging Defendants With Liability.

(a) Record of Evidence.

The reaction test is completely misleading.

Both consumer reaction tests relied upon by plaintiff were conducted under precisely the same circumstances and with the same set of questions. The fact that the results of the second were similar to the first proved only that the tests were consistent with each other. Had plaintiff honestly sought a true picture plaintiff could have presented a different test for a second test. Had a different test been tried, the results may have been quite at variance.

Plaintiff in its brief says of its tests, "It submits that a more reliable presentation of the facts in issue here could not possibly be devised." Defendant suggests that a more honest survey could have been presented had plaintiff tested the reactions of lamp buyers in stores where lamps are bought. That would have been a real and reliable test.

The unfairness of the test is revealed by Mr. Lampa under cross-examination:

> "Q. Mr. Lampa, among the 1,500 interviews which you reported upon, not one of those persons was shown an actual lamp, were they? A. No. sir.
>
> Q. Not one of those persons was shown one of the labels which was attached to the lamp that you took a photograph of? A. No, sir.
>
> * * * * * * * *
>
> Q. Can you tell me, Mr. Lampa, what prompts you to show a photograph of a lamp, such as this (indicating), and to leave out of the picture all environment? Why do you just show the lamp by itself? A. Why did I show it all by itself?
>
> Q. Yes. A. I thought it would be clearer and less confusing to the person being interviewed. *If you had other objects in there, their eyes might wander or their minds might wander."* (Emphasis ours.)

From this it is obvious that the survey was one engineered to produce a result other than the result which would have been produced under circumstances wherein the goods are normally sold.

(b) Plaintiff's Authorities on the Question of Reaction Tests Are Unreliable.

The case of *S. C. Johnson & Son v. Johnson*, 28 Fed. Supp. 744, was one wherein inquiries were made by *prospective purchasers* and not by canvassers in a field foreign to the market place. In that case the names were identical and the products substantially so.

In *Tillman & Bendel v. California Packing Corp.*, 63 F. 2d 498, "Del Monte" for fruits and vegetables was infringed by "Del Monte" for coffee. The survey showed that persons who "*when they purchased* defendant's coffee thought it was a product of the same concern that packed Del Monte fruits and Del Monte vegetables." (Emphasis ours.) Moreover, the survey was abundantly supported by proof of *actual confusion*.

In *Oneida, Ltd. v. National Silver Co.*, 25 N. Y. S. 2d 271, *identical* products, namely, silverware, were involved and the pattern simulated. The survey conducted by college girls was one wherein the girls pretended to be *shoppers or purchasers* and actually tested sale of the goods where the goods were ordinarily sold.

Had plaintiff here chosen a *purchaser* survey the evidence would have been significant and doubtless different.

VII.

The Case Against Expert Lamps, Inc.

For at least the past quarter century plaintiff, Chicago Flexible Shaft, subsequently the Sunbeam Corporation, resided in Chicago where also Expert Lamps, Inc., had its place of business. Both companies used the trademark Sunbeam throughout substantially that period. Plaintiff

used the mark on electric appliances: Expert Lamps, Inc. used the mark on decorative lamps [R. 255]. In all of that time plaintiff apparently did not experience sufficient evidence of confusion to warrant taking any notice of Expert Lamps.

Plaintiff with the tribunals of the United States District Court in Chicago available to it in 1948 elected not to pursue what rights it may have supposed it had against Expert Lamps in Chicago but instead selected the District Court for the Southern District of California in which to bring its action. In its complaint, filed October 5, 1948, it attempted to join Expert Lamps, Inc. with defendants here in litigation. That litigation against Expert Lamps was terminated by court order after a motion duly brought to quash service on Expert Lamps because the court had no jurisdiction over it.

Nevertheless plaintiff has persisted in presenting evidence and proofs of the fact that it is use of the tag of Expert Lamps carrying the trademark SUNBEAM for decorative table lamps which constitutes the acts of infringement herein charged against the defendant Sunbeam Furniture Corporation.

Expert Lamps, Inc. has not had its day in court. In the trial of this case when defendant sought to introduce evidence of contemporaneous use of the trademark SUNBEAM by Expert Lamps, the trial judge sought to discourage and exclude it. The following excerpt from the record is significant [R. 252-255]:

> "Q. How long have you known the Expert Lamp Company? A. All of my life.
>
> Q. Would you say about how many years you have known them as a manufacturing company? A. I

don't really know when the Expert Lamp Company went into business.

The Court: You are creating an issue that isn't created by the pleadings. The motion to quash the summons against the Expert Lamp Company was sustained, and they are not before the court. I can't see why you are creating an issue.

Mr. Beehler: We have been charged with trademark infringement. The Sunbeam Furniture Corporation has no trademark. The only trademark on any goods which the Sunbeam Furniture Corporation merchandises in any way whatsoever is the Sunbeam trademark of the Expert Lamp Company."

* * * * * * * *

Mr. Beehler: There was an abundance of testimony, your Honor, introduced here yesterday by the plaintiff purporting to show that we, as defendants, because we handled the Expert Lamp Company lamps are infringers.

The Court: I am not passing upon that question. I am passing upon the materiality of the testimony you are eliciting from this witness, which bears upon the status of a company which is not a party to this action. I am not objectng to any questioning relating to the dealings between him and the company. We can't make a finding that would affect the Expert Lamp Company.

* * * * * * * *

The Court: . . . We are not trying the Expert Lamp Company. If they have a case against them, it is up to the plaintiff to start it in the proper jurisdiction. Go ahead. Let's hear the last question.

Mr. Beehler: I will risk one more question.

The Court: There is a question unanswered, I think.

(The last question and answer thereto were read by the reporter.)

The Court: He doesn't know. That is another reason why this inquiry is not proper. Go ahead.

Mr. Beehler: I would like to risk this question if you don't mind.

Q. (By Mr. Beehler): *How long has the Expert Lamp Company used the name 'Sunbeam' for lamps?*

The Court: To your knowledge. You never were connected with them in any capacity, were you?

The Witness: No.

The Court: All right.

The Witness: *To the best of knowledge for the last 20 to 25 years."* (Emphasis ours.)

Nevertheless after taking this attitude when defendants sought to present evidence, the court took a different attitude when plaintiff sought to introduce the deposition of Arthur M. Luster taken in Chicago. During that deposition counsel for defendants objected to all questions propounded to Arthur M. Luster where those questions related to the activity of Expert Lamps, Inc. When that deposition was presented before the trial court defendant's counsel repeated the objections. The reading of the deposition ran much as follows [R. 272-275]:

"Mr. Pattishall: Will you give me the names and addresses of the officers of Expert Lamps, Inc.?

Mr. Beehler: I raise objection.

The Court: The objection is overruled.

Mr. Christophersen: 'Arthur M. Luster, 3172 Sheridan Road.'

Mr. Pattishall: What office?

Mr. Christophersen: President. Frieda Luster, same address, Secretary. Mort R. Luster, Vice President and Director.

Mr. Beehler: Let me state for the record that it is understood that with respect to any of the questions dealing with Expert Lamps, I am making one objection to the entire line without the necessity of repeating them, although in some instances I will instruct the witness not to answer specific questions.

Mr. Pattishall: That is understood.

The Court: All right. Go ahead.

Mr. Pattishall: Could you give us Mr. Mort Luster's address, please?

Mr. Christophersen: 6428 North Francisco, Chicago, Illinois—

The Court: I will overrule the objection. I will state now, while we are at it, we will complete the entire deposition, because you may want to have a comment to make upon the testimony brought out here, so it will be more intelligible to me than it was before, before I read it.

* * * * * * * *

Mr. Beehler: I object to that and instruct the witness not to answer.

The Court: Did he answer?

Mr. Pattishall: He didn't answer.

Mr. Beehler: He didn't answer.

The Court: If he were here I would make him answer. I cannot make him answer, though."

From the foregoing it is clear that all questions and answers with regard to Expert Lamps, Inc. appearing in the deposition should be stricken. The injunction in this case strikes at the defendant through Expert Lamps, Inc.

in a manner and under circumstances wherein defendant could not offer a defense. The character of the decision is such that the defendant here is made to suffer from the unproven charges against Expert Lamps, Inc.

Even where plaintiff has sought to show that Expert lamps are on sale bearing Expert's trademark SUNBEAM plaintiff has not proved that those lamps reached their destination through the defendant. Plaintiff has not shown that defendant is the sole distributor and source of Expert lamps in southern California. Defendant is not the only outlet here for Expert lamps.

> "The Court: Are you the only outlet they have between Chicago and here?
>
> The Witness: No." [R. 258.]

The defendant here is charged with a burden arising from an unproven case against Expert Lamps, Inc., under circumstances where no defense could be offered.

VIII.

Conclusion.

All of the facts and circumstances therefore clearly indicate no liability whatsoever or of any kind by defendant here whether in connection with a charge of trademark infringement or unfair competition.

Respectfully submitted,

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VERNON D. BEEHLER,

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HERBERT A. HUEBNER,
Of Counsel.

No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBEAM FURNITURE CORP., a corporation, ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, individuals doing business as SUNBEAM FURNITURE SALES CO.,

Appellants,

vs.

SUNBEAM CORPORATION, a corporation,

Appellee.

PETITION OF SUNBEAM FURNITURE CORP., ET AL., FOR RE-HEARING.

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TOPICAL INDEX

No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Sunbeam Furniture Corp., a corporation, Arthur M. Luster, Melvin R. Luster and Frieda Luster, individuals doing business as Sunbeam Furniture Sales Co.,

Appellants,

vs.

Sunbeam Corporation, a corporation,

Appellee.

PETITION OF SUNBEAM FURNITURE CORP., ET AL., FOR RE-HEARING.

Come now Sunbeam Furniture Corp., Arthur M. Luster, Melvin R. Luster and Frieda Luster, doing business as Sunbeam Furniture Sales Co., appellants, and present this their petition for a re-hearing of those portions of the above-entitled cause wherein appellants have been held to infringe the trademark "Sunbeam" by reason of handling decorative lamps on which appears a tag and label of Expert Lamps, Inc., carrying Expert's trademark "Sunbeam." For their reasons, appellants state as follows:

In a decision dated June 8, 1951, this Court affirmed issuance of an injunction against appellants' sale of lamps bearing the mark "Sunbeam," which lamps the appel-

lants purchased from Expert Lamps, Inc., of Chicago, not a party to this lawsuit. Such lamps so purchased from the manufacturer, Expert Lamps, Inc., of Chicago, bear a tag showing plainly the name of the manufacturer, Expert Lamps, Inc., accompanied by the trademark "SUNBEAM." The decision is, as to its practical effect, an adjudication of infringement against Expert Lamps, Inc., the manufacturer and user of the mark "SUNBEAM," which was not a party to this litigation. Expert Lamps, Inc., was not represented in this case. There was no defense presented for Expert Lamps, Inc., at the trial of the case. Nevertheless, appellants here, because they trans-ship the merchandise of Expert Lamps, Inc., as they do for other manufacturers, are bound by the effect of that decision. That decision against appellants would continue to bind them even though Expert Lamps might be adjudicated a non-infringer after fair trial in some other jurisdiction.

A. Appellants Are Entitled to Benefit of Defenses Available to Expert Lamps, Inc., Which Has Not Had Its Day in Court.

The trial court and the Court of Appeals both placed reliance on evidence that members of the same family had a proprietary interest in Expert Lamps, Inc., and in Sunbeam Furniture Corp. No legal relationship between the two corporations exists nor was shown. The ownership of the two corporations is not identical. Each is a separate entity under the law.

Expert Lamps, Inc., was initially joined as party-defendant but since the District Court had no jurisdiction of that corporation, the suit against Expert Lamps,

Inc., had to be dismissed. Appellee then took no action to sue Expert Lamps, Inc., in its own jurisdiction in Chicago where both Expert Lamps, Inc., and appellee were long resident.

Expert Lamps, Inc., or its predecessor in business had used the trademark "SUNBEAM" for a great many years contemporaneously with appellee. This record shows twenty-five years use by Expert Lamps, Inc., and appellee's counsel at the hearing before this Court of Appeals discussed use by Expert Lamps, Inc., of the trademark "SUNBEAM" for sixteen years. The defense of laches or equitable estoppel is open to Expert Lamps, Inc., but was not open to appellants here because of their relatively recent handling of the merchandise of Expert Lamps, Inc. At the trial of this case in the lower court, evidence offered by appellants in support of long continued use by Expert Lamps, Inc., was refused admission. Evidence tending to tie together the activities of Expert Lamps, Inc., and appellants here was admitted over strenuous and repeated objections.

Appellants are entitled to have the benefit of all of the defenses including estoppel which are available to Expert Lamps, Inc., and such defenses have not been permitted them.

On February 7, 1951, appellee here filed suit in the Federal Court for trademark infringement against the same Expert Lamps in Chicago, Civil Action No. 51C219. That was subsequent to the bringing of the appeal before this court on May 3, 1950, and the filing of the Appellee's Closing Brief on January 20, 1951. The hearing before this court occurred April 14, 1951. On that occasion counsel for appellee informed the court for the first

time of the existence of the infringement suit in Chicago. Expert Lamps in the Chicago suit had pleaded laches, among other defenses, predicated upon continued and uninterrupted use of the mark "SUNBEAM" since 1934 for decorative table and floor lamps. Appellee's place of business in Chicago is located at 5600 Roosevelt Road. Expert Lamp's place of business in Chicago is located at 3300 South Indiana Avenue. These locations are within a few miles of each other. In all the intervening *sixteen years* until Civil Action No. 51C219 was filed, appellee took no action.

Appellants in this suit, Appeal No. 12628, are entitled to maintain a *status quo* until Expert Lamps in Chicago has had its day in court and has offered its defenses and the courts in that jurisdiction have ruled on the question of infringement by Expert Lamps.

Appellee here is without right to disrupt appellants' business until the charge of infringement has been truly adjudicated. Therefore, that portion of the decision affirming the injunction against appellants' sale of another manufacturer's lamps bearing the term "SUNBEAM" should be stayed. If the Federal Court in Chicago where the *Expert Lamp* case will be tried rules that Expert Lamps has a right to use the term "SUNBEAM" to designate its lamps, then obviously these appellants should be free as wholesalers to handle said merchandise in the same manner that other dealers would be free to handle that merchandise.

The instant suit was predicated on appellants' right to use Sunbeam Furniture Corp. to designate its business as a wholesaler of furniture. That question this court decided in favor of appellants.

The question of whether Expert Lamps, Inc., of Chicago, a manufacturer not a party to this lawsuit, has a right to designate its lamps with the mark "SUNBEAM" was never adjudicated here, nor could it be adjudicated here unless it was a party to this suit. To enjoin appellants from marketing lamps of Expert Lamps, Inc., impliedly holds that Expert Lamps, Inc., has had its day in court, that its defense of sixteen years of continuous uninterrupted use of the term "SUNBEAM" for its lamps is invalid and that whatever other defenses Expert Lamps might plead and prove have been adjudicated adversely before it has had its day in court.

If appellee felt it had a strong case against Expert Lamps of Chicago it would, long before a lapse of sixteen years, have filed suit there. Not until after this appeal was perfected was suit filed against Experts Lamps in Chicago. It would appear that this significant fact would be tantamount to an admission by appellee that Expert Lamps must have a strong defense and *prima facie* has a right to continue the use of the term "SUNBEAM" for lamps after sixteen years of uninterrupted use.

If the courts in Chicago should rule that Expert Lamps has a right to use of the term "SUNBEAM" for lamps, then these appellants (who are merely wholesalers of furniture and products of others) would be under an injunction of this court and would be precluded from handling Expert's merchandise, while other wholesalers in this district would be free to handle said Expert lamps.

If the courts in Chicago should, on the other hand, rule that Expert Lamps has no right to continue the use of "SUNBEAM" for lamps, then obviously Expert

would be under an injunction and no Sunbeam lamps would be manufactured or sold anywhere throughout the United States. This would afford appellee all the relief it needs.

This court should therefore grant a re-hearing as to the propriety of the injunction against the handling of lamps manufactured by Expert Lamps of Chicago, not a party to the suit.

B. The Court of Appeals Here Has Misconstrued Its Previous Ruling in Sunbeam Lighting Company as Applied to the Facts in This Case, Appeal No. 12628.

The *Sunbeam Lighting* case (183 F. 2d 969) concerned two products, one a type of fluorescent fixture purchased from Sunbeam Lighting Company by discriminating purchasers, namely, architects and engineers for commercial installation; the other a portable non-decorative desk lamp. The surveys conducted by Sunbeam Corporation were directed to a showing that the fluorescent fixtures purchased by discriminating purchasers were likely to be confused as to their origin. The likelihood of confusion attributed to portable lamps was held by this court to have arisen by reason of the fact that Sunbeam Lighting Company additionally employed in connection with their sale the word "Master." Sunbeam Corporation also employs the word "Master" in connection with its kitchen appliances.

Decorative lamps in the present appeal are in a different category. The only thing in common is that they can be moved at will. They are purchased by extremely exacting and discriminating purchasers, but survey was

directed to lamps under conditions where no such decorative lamps are ever purchased. In the present case there is no attendant use of some other term such as the term "Master" which might encourage confusion. The fact that the word "SUNBEAM" is displayed prominently is not an act chargeable with confusion because the word "SUNBEAM" is prominently displayed as the trademark of Expert Lamps, Inc., and no one else. The manufacturer's name, Expert Lamps, Inc., is boldly printed on the same label. There is no employment of any special lettering tending to simulate appellee's mark.

No credible instances of confusion were proven in the trial of this case.

Numerous appellee's witnesses have attested to many years of selling both Sunbeam Corporation products and decorative lamps without one instance of confusion. One such instance covered a period of *eighteen years.* There is consequently proof of the fact that there is no likelihood of confusion since no confusion has ever existed. This court therefore is in error in spelling from facts to the contrary a likelihood of confusion as justifying a holding of infringement.

The law applied by this court in the *Sunbeam Lighting* case, where attendant circumstances evidenced likelihood of confusion, does not apply. In that case there was not the lack of confusion proven under comparable circumstances such as has been proven here.

Therefore the decision of this court in our Appeal No. 12628, wherein it sustains the injunction against use of "SUNBEAM" on decorative lamps, is contrary to the basis of its decision with respect to both types of lighting

equipment in the *Sunbeam Lighting* case, and for this court to be consistent, the present decision should be changed.

Moreover, as pointed out in the *Sunbeam Lighting* case and in this case, courts of appeal throughout the United States are substantially in agreement that *weak marks* should not be afforded broad protection and the protection extended into unrelated fields. Recent decisions by this court have brought decisions in the Ninth Circuit further in conformance with the accepted standard of trademark infringement.

In the *Sunbeam Lighting* case these words appear:

> "Defendants-appellants have added the words *'Sunlite Master'* to the use of the words 'Sunbeam Manufacturing Co., Los Angeles, California,' to their portable fluorescent lamps. Portable lamps are sometimes sold as household utensils are sold and plaintiff has extensively used the word *'Master'* in connection with the word 'Sunbeam' upon its products." (Emphasis ours.)

Then follows that portion of the decision predicated upon the facts referred to, namely:

> "The judgment is affirmed in so far as it enjoins defendants-appellants from the use of the words 'Sunlite Master' and 'Master' in association with the word 'Sunbeam,' and from the use of the word 'Sunbeam' by a script resembling or suggestive of the script used by plaintiff-appellee. The judgment is reversed in all other particulars."

Sunbeam Lighting Co. v. Sunbeam Corporation, 183 F. 2d 969, 971, 974.

In the case here on appeal the facts are different. The portion, therefore, of this decision which still holds the trademark "SUNBEAM" in an unrelated field to be an infringement is not consistent with the other decisions made by this court as well as by other courts of appeal and should be rectified by a reversal of the judgment of the trial court in issuing an injunction against use of "SUNBEAM" on decorative lamps.

For the foregoing reasons it is respectfully urged that this petition for re-hearing be granted and that the judgment of the trial court with respect to the issuance of the injunction be reversed.

Respectfully submitted,

HUEBNER, BEEHLER, WORREL & HERZIG,
and
VERNON D. BEEHLER,
Attorneys for Appellants.

HERBERT A. HUEBNER,
Of Counsel.

Certificate of Counsel.

I, Vernon D. Beehler, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

Vernon D. Beehler,

Attorney for Petitioner.

In the

United States Court of Appeals

For the Ninth Circuit

No. 12,628

SUNBEAM FURNITURE CORP., a corporation, **ARTHUR M. LUSTER, MELVIN R. LUSTER**, and **FRIEDA LUSTER**, individuals doing business as **SUNBEAM FURNITURE SALES CO.**, *Appellants*, *vs.* **SUNBEAM CORPORATION**, a corporation, *Appellee.*	Appeal from the United States District Court, Southern District of California, Central Division. Honorable **Leon R. Yankwich**, Judge Presiding.

REPLY TO PETITION OF SUNBEAM FURNITURE CORP., ET AL., FOR REHEARING.

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In the

United States Court of Appeals

For the Ninth Circuit

No. 12,628

SUNBEAM FURNITURE CORP., a corporation, **ARTHUR M. LUSTER, MELVIN R. LUSTER**, and **FRIEDA LUSTER**, individuals doing business as **SUNBEAM FURNITURE SALES CO.**, *Appellants*, *vs.* **SUNBEAM CORPORATION**, a corporation, *Appellee.*	Appeal from the United States District Court, Southern District of California, Central Division. Honorable **Leon R. Yankwich**, Judge Presiding.

REPLY TO PETITION OF SUNBEAM FURNITURE CORP., ET AL., FOR REHEARING.

Appellants secured a stay of the mandate in this action without serving or notifying appellee or any of its counsel in any way. This is reminiscent of their neglecting to make any service of copies of Appellants' Designation of Contents of Record on Appeal or their Statement of Points on Appeal, as required by Rule 19(6) of this court. Since it was presumed to be an oversight, no formal objection was made to this omission (the particulars of which appear at page 440, Vol. 2 of the record) at the time, although it did necessitate printing the record in two volumes and jumbling the sequence of testimony. Their persistent failure to keep their opposition advised and to follow orderly and cus-

tomary practice now seems to deserve the attention of the court.

Appellants' arguments may be summarized as follows:

1. That Expert Lamps, Inc. has not had its day in court.
2. That this court has misconstrued its own decision in *Sunbeam Lighting Company* v. *Sunbeam Corporation,* 183 F. (2d) 969.
3. That the decision herein is inconsistent with prior decisions of this and other courts in that Sunbeam Corporation was granted any relief whatsoever.

1.

Appellants are in the anomalous position of having moved to quash service on and to dismiss Expert Lamps, Inc. as a party defendant (Rec. 12, 20), while now complaining that Expert Lamps "has not had its day in court". They argue that Expert Lamps has allegedly used SUNBEAM as a trade-mark for lamps contemporaneously with Sunbeam Corporation's use sufficient to support a defense of laches or equitable estoppel. Laches or equitable estoppel are, of course, affirmative defenses and must be pleaded as such. There are no such pleadings before the court. In fact, to entitle appellants to raise any defenses which Expert Lamps, Inc. might have, they must have been specifically pleaded. Appellants' answer is merely a general denial (Rec. 38-41). It does not even attack the validity of appellee's registered trade-mark.

Appellants state at page 3:

> "At the trial of this case in the lower court, evidence offered by appellants in support of long continued use by Expert Lamps, Inc., was refused admission."

This is not true, as reference to the record (pages 251-255) clearly reveals. The trial court pointed out to counsel that

his effort was outside the pleadings and therefor immaterial; but even so, after an extended colloquy with counsel, it permitted him to proceed. The court stated (Rec. 254):

> "Go ahead. It doesn't do me any good. I take more time determining it than I do listening to it. * * * What I am trying to do is merely limit you to the issues here. We are not trying the Expert Lamp Company. If they have a case against them, it's up to the plaintiff to start it in the proper jurisdiction. Go ahead. Let's hear the last question."

Appellants argue that enjoining their sale of SUNBEAM lamps impliedly denies Expert Lamps, Inc. its day in court and holds that such defenses as it might plead and prove have already been adjudicated adversely. It is elementary, however, that the adjudication herein is confined to the issues pleaded and to the parties before this court.

It appears that appellants would "have their cake and eat it too"; for they have espoused the benefits of dismissal of Expert Lamps, Inc., thereby necessitating appellee's filing and prosecuting two separate actions against the same family enterprise, yet they now complain of the results of their acts.

2.

Appellants argue that this court does not understand its own recent ruling in *Sunbeam Lighting Company* v. *Sunbeam Corporation,* 183 F. (2d) 969. Their difficulties in fabricating such an argument are apparent in almost every line, but their principal contention seems to be that the *Lighting Company* decision did not hold confusion likely as to portable lamps. On page 8 of their Petition appellants have quoted from two portions of the *Lighting Company* opinion with the false statement that the second paragraph quoted "follows" the first. They have conveni-

ently omitted these sentences which actually follow their first quotation, and which read (page 971):

> "We think the difference between electrical fluorescent lighting fixtures with the method of their marketing, the portable lamps and the way they are marketed puts the latter on sale in such a way as to cause confusion. The injunction should cover this item."

The instant decision refers directly to the above as follows (page 4):

> "We pointed out in the *Sunbeam Lighting Co.* case, *supra,* that the remoteness of confusion by the purchaser of electric fluorescent light fixtures with the manufacturer of household appliances stemmed largely from the fact that the light fixture is ordinarily selected by an architect and installed by an engineer or an electrical contractor, *in contrast to the 'over the counter' purchase of a kitchen gadget. However, the distinction was not held to apply to portable fluorescent lamps which in common knowledge yield to sale and purchase in similar manner to the sale and purchase of household appliances.*" (Emphasis ours)

3.

Throughout appellants' petition there appear claims and arguments that this court "is in error in spelling from facts to the contrary a likelihood of confusion as justifying a holding of infringement", and that its decision is inconsistent "with the other decisions made by this court as well as by other courts of appeal." Appellee submits that such efforts are no more than a "re-hash" of the questions already briefed, heard, considered and decided herein. It is believed that the numerous authorities cited in the court's opinion, as well as its references to the evidence, provide ample reply to such contentions.

Conclusion.

Appellants are estopped to raise any alleged defenses which they might have urged as arising from the former defendant, Expert Lamps, Inc., since Expert is not before the court and since any such alleged defenses are outside the pleadings. That this court's opinion is consistent with its rule in the *Sunbeam Lighting* case is clear from the full text of both opinions. That it is in accordance with the law of the Ninth Circuit, The State of California and the other circuits is obvious from an examination of the authorities cited and from numerous other authorities.

For the foregoing reasons it is urged that Appellee's Petition for Rehearing be denied.

Respectfully submitted,

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Lewis S. Garner,
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No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors of California,

Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

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Appellee and Cross-Appellant,

John C. Kazanjian, doing business as Red Lion Packing Company,

Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

This matter comes before the Court on an appeal by Joseph Denunzio Fruit Company, complainant herein, from a judgment of the District Court (Judge James M. Carter) dismissing the action as to Raymond M. Crane, doing business as Associated Fruit Distributors of California, and John C. Kazanjian, doing business as Red Lion Packing Company. The cross-appeal is by Crane.

The action originated before the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act of 1930, as amended. The Secretary of Agriculture rendered a Reparation Order against Crane and dismissed the proceeding as to Kazanjian. Crane

appealed to the United States District Court for the Southern District of California, Central Division, and on a trial *de novo* before Judge J. F. T. O'Connor the order of the Secretary of Agriculture was affirmed.

Crane made a motion for a new trial. Judge O'Connor died before hearing the motion. By stipulation, the motion was heard by Judge James M. Carter, who granted the motion but held that a new trial was not necessary because the contract relied upon by complainant was invalid, being in violation of the Emergency Price Control Act, and he thereupon ordered the action dismissed as to Crane and Kazanjian.

The cross-appeal by Crane is to review certain Findings of Fact and Conclusions of Law and is prosecuted so as to present a defense urged by Crane and not sustained by Judge O'Connor in the trial before him and not sustained by Judge Carter by reason of the fact that he adopted the Findings of Fact made by Judge O'Connor without change, and in addition thereto made certain Conclusions of Law consistent with said adopted Findings of Fact.

We feel that even though this Court should not agree with the reasoning of Judge Carter on the question of invalidity of the contract, still his decision should be affirmed for the reasons urged on this cross-appeal.

Opinions Below.

The opinion of the Secretary of Agriculture [Tr. pp. 63 to 79] is reported in 6 Agricultural Decisions 139.

The opinion of Judge O'Connor [Tr. pp. 82 to 137] is reported in 79 Fed. Supp. 117.

The opinion of Judge Carter [Tr. pp. 164 to 169] is reported in 89 Fed. Supp. 962.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is based on the provisions of law set forth in 7 U. S. C. A., Sec. 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo,* the appeal from the reparation order of the Secretary of Agriculture, is based on the provisions of the law set forth in 7 U. S. C. A., Sec. 499(g).

Jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is based upon the provisions of law set forth in Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 1291.

Statutes Involved.

One of the statutes involved in this proceeding is the Perishable Agricultural Commodities Act set forth in 7 U. S. C. A., Sec. 499(a) to (r).

This Act deals with the shipping of perishable agricultural commodities in interstate commerce (Sec. 499(a)). It provides that it shall be unlawful in connection with any transaction in interstate commerce for any dealer to fail to deliver in accordance with the terms of a contract, without reasonable cause, any perishable agricultural commodity bought or sold, or contracted to be bought, sold or consigned in interstate or foreign commerce by such dealer (Sec. 499(b)(2)).

It licenses persons to engage in the business of commission merchants, dealers or brokers (Sec. 499(c)). It pro-

vides for liability on the part of a commission merchant, dealer or broker who violates any of the provisions of Section 499(b) to the person injured, for the full amount of damages sustained in consequence of such violation and provides for the enforcement of the liability by complaint to the Secretary of Agriculture or by suit in any court of competent jurisdiction (Sec. 499(e)).

It provides for the filing of a complaint with the Secretary of Agriculture by any person complaining of any violation within nine months after the cause of action arises (Sec. 499((f)(a)).

It provides for a hearing on the complaint by the Secretary of Agriculture and for a reparation order by the Secretary of Agriculture if the facts justify the same (Sec. 499(g)(a)).

It allows an appeal from a reparation order to the District Court of the United States for the District in which the hearing was held, within thirty days from the date of the reparation order and for a trial *de novo* by the District Court (Sec. 499(g)(c)).

The statutory provision allowing an appeal to this Court is Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 1291, which provides for an appeal from a final judgment of the United States District Court to the United States Court of Appeals for the Circuit in which the District Court is located.

Statement of Pleadings and Facts.

PLEADINGS.

In its amended complaint filed before the Secretary of Agriculture, Denunzio alleged that complainant was a Kentucky corporation and that respondents Crane and Denunzio were residents of California and were licensed under the Perishable Agricultural Commodities Act of 1930 as dealers, commission merchants and/or brokers; that on October 3, 1944, in the course of interstate commerce Crane, acting as principal or agent for Kazanjian, or as both, contracted to sell Denunzio three carloads of California Emperor grapes to be shipped from California to Louisville, Kentucky; that one A. B. Rains, Jr., of Louisville, Kentucky acted as agent for all parties; that Crane and Kazanjian failed to ship or deliver the grapes; that complainant purchased replacement cars at a cost of $5723.50 in excess of the contract price. [Tr. pp. 17 to 28.]

Crane filed an answer before the Secretary of Agriculture denying that he was acting as either principal or agent for Kazanjian in the sale of said grapes and alleged that he was acting solely as a buying agent for Denunzio; Crane further denied complainant's allegations for the reason that no valid contract was entered into; that negotiations were had leading up to the sale of said grapes but that certain stipulations of the negotiations were never complied with; that the buyer never signed a confirmation of sale or made a deposit of $750.00 per car, and that no valid and enforceable contract was ever consummated; that Crane acted only as agent for complainant in a buying

capacity and was to receive $50.00 per car as a procurement charge to be paid by the complainant; that Crane had no financial interest in the transaction other than the payment to him of said procurement charge; that if any cause of action exists it exists against Kazanjian. [Tr. pp. 49 to 52.]

Kazanjian also filed an answer [Tr. pp. 53 to 62], but in view of the fact that in the District Court complainant filed its election to take a judgment against Crane and dismiss as to Kazanjian [Tr. p. 138] the statement of Kazanjian's pleadings will be omitted.

FACTS.

Denunzio is a car-lot receiver, jobber and service wholesaler having its place of business at Louisville, Kentucky; A. B. Rains, Jr. is a food broker at Louisville, Kentucky; Crane is a broker or car-lot distributor having his place of business at Los Angeles, California; Kazanjian is a grower and packer at Exeter, California, and also operates as a broker. [Findings not objected to, Tr. pp. 139 and 145 and 171 and 172.]

(The following facts were shown by telegrams and copies of teletype conversations.)

On September 26, 1944, Crane sent a form telegram to thirteen different brokers throughout the United States, stating that he could book eighteen cars of Emperor grapes, the same to go in storage commencing October 9th, shipper to transfer title on or after December 10th, he paying all storage charges, $500.00 part payment with con-

firmation, price $2.53 net to shipper, Crane charging $50.00 per car procurement charge. The telegram contained the code word "Adlam" which means "offer subject to confirmation." One of these form telegrams was sent to A. B. Rains, Jr. of Louisville, Kentucky. [Tr. pp. 198 to 202.] In a teletype conversation which followed between Crane and Rains on September 28th, Rains offered to take four cars of grapes on terms different than offered. Crane replied that the matter would have to be put up to the shipper as the deal was based exactly as we told you. [Tr. p. 222.]

On September 28th Crane wired Rains that it was impossible to make a deal except as quoted in his night letter (referring to his night letter of September 26th). [Tr. p. 203.]

On October 2nd Crane sent out another form telegram to the same brokers referring to the night letter of September 26th and quoting fifteen cars U. S. One at $2.50 net on the same deal, asking for the parties to wire quick if they wanted any part of the deal. [Tr. p. 205.] As the result of a teletype conversation between Crane and Rains concerning the offers to sell Emperor grapes, Rains approved a sale of three cars to Krotzki, another commission merchant that he represented [Tr. p. 230] and thereafter and on October 2nd Crane telegraphed Rains as follows:

> "Talked shipper Red Lyon Packing Company Confirms Kortski Necessary 750.00 car airmail deposit with signed confirmation Emperors available now Only two more cars possibly three same base." [Tr. p. 206.]

In a teletype conversation which occurred on October 3rd between Rains and Crane, each party orally confirmed two cars to Krotski and three cars to Denunzio, and Crane stated they would airmail confirmations for buyer's signature, and Rains stated he would airmail checks with signed confirmations when he received your (Crane's) copies. [Tr. p. 234.]

On October 3rd Rains mailed Crane a Standard Memorandum of Sale showing two cars of grapes sold to Denunzio for account of Associated Fruit Distributors. [Tr. pp. 236-7-8.]

On October 3rd Crane wired Kazanjian the facts with reference to the purchases and Kazanjian wired back stating they were satisfactory but injecting some new terms into the deal. [Tr. pp. 217-8.]

On October 10th Crane wired Rains:

> "Shipped (r) Red Lion takes view account ceiling lifted any contracts Emperors voided * * *." [Tr. p. 209.]

Kazanjian refused to ship grapes to Denunzio and this litigation resulted.

Statement of the Case.

After the death of Judge O'Connor a stipulation was entered into by all of the parties providing that said motion for a new trial could be heard before Judge James M. Carter; that said motion may be heard and decided on the judgment roll, together with the exhibits on file and without a reporter's transcript unless the Judge hearing said motion desires that a reporter's transcript be written up for his use in ruling upon said motion, and that the hearing on said motion for a new trial on the record provided for shall be without prejudice to raise any questions on appeal which appellant might deem proper in the event of a denial of his motion for a new trial and an appeal from the judgment. [Tr. pp. 161-3.]

In Judge O'Connor's Findings of Fact and Conclusions of Law he found and held:

1. Rains acted exclusively as buying broker for Denunzio.

2. Kazanjian was an undisclosed or partially disclosed principal.

3. Crane was not the buying broker for Denunzio.

4. Crane was not a principal.

5. Crane acted as agent for Kazanjian, an undisclosed or partially disclosed principal. [Tr. pp. 147-8.]

On the hearing of the motion for a new trial, counsel for Crane took the position that in view of the Findings and Conclusions of Judge O'Connor to the effect that Crane was not a principal but was the agent for Kazanjian, the contract relied upon by Denunzio was an illegal contract, it being a contract for the sale of grapes at a price in ex-

cess of the ceiling established under the Emergency Price Control Act.

The same argument was made to Judge O'Connor after he signified he would rule that Crane was the agent of Kazanjian and not the agent of Denunzio.

Before hearing argument on the motion for a new trial Judge Carter announced that he would not review the evidence in this case on the question as to whether or not the Findings of Fact were supported by the evidence, but would confine his ruling to the following questions:

1. Are the Conclusions of Law supported by the Findings of Fact?

and

2. Did the trial court properly apply the law to the facts as found by the trial court? [Tr. p. 181.]

After hearing the argument of counsel and giving further consideration to the matter, Judge Carter, by a written memorandum opinion [Tr. p. 164] held the contract to be a violation of the Emergency Price Control Act and void.

In the Findings of Fact Judge Carter adopted without change the Findings of Fact made by Judge O'Connor and some of his Conclusions of Law. Other Conclusions were changed to support his decision on the invalidity of the contract.

Among the Findings of Fact made by Judge Carter are the following:

1. That Crane offered to sell fifteen cars U. S. No. One Emperor grapes. [Tr. p. 173, subd. 4 of par. II.]

2. That Crane, on behalf of Kazanjian, repudiated the contract by his telegram of October 10, 1944, to Rains. [Tr. p. 175, subd. 10, par. II.]

3. That Crane repudiated the contract as agent by telegram dated October 13, 1944, to Rains. [Tr. p. 175, subd. 11, par. II.]

Among the Conclusions of Law made by Judge Carter, is the following:

That in negotiating the contract in question Crane was acting as agent for Kazanjian, who was the undisclosed or partially disclosed principal. [Tr. p. 177, par. III.]

That the contract in question, being for the sale of three carloads of grapes for a consideration consisting of two sums, the first sum being $2.50 per lug to be paid to Raymond M. Crane as such agent * * * [Tr. p. 177, par. IV.]

Specifications of Error.

On this appeal cross-appellant Crane contends that Judge Carter erred:

1. In finding Crane offered to sell grapes.
2. In finding Crane, on behalf of Kazanjian, repudiated the contract by his telegram of October 10, 1944.
3. In finding Crane repudiated said contract as agent.
4. In making the implied Finding of Fact that in negotiating the contract in question Crane was acting as agent for Kazanjian, who was the undisclosed or partially disclosed principal.

5. In making the following Conclusion of Law:

   "That in negotiating the contract referred to in paragraph II of the Foregoing Findings of Fact, * * * Crane, * * * was acting as agent for * * * Kazanjian, * * * who was the undisclosed or partially disclosed principal." [Tr. p. 263.]

6. In holding that the Findings of Fact and the evidence support the Conclusion set forth in paragraph IV of said Conclusions to the effect that the sum of $2.50 per lug was to be paid to Crane as agent for Kazanjian.

It is Crane's contention that the foregoing Findings and Conclusions are erroneous for the reason that the evidence discloses Crane was the agent of Denunzio—not Kazanjian.

Summary of Argument.

1. Crane acted as a buying agent or procuring broker for Denunzio.

2. Crane, being the agent of Denunzio, would not be liable to Denunzio for Kazanjian's failure to deliver under the alleged contract.

ARGUMENT.

Point I.

It is the contention of cross-appellant Crane that the telegrams and teletype messages heretofore summarized or set forth, and the evidence of Mark Denunzio, one of the officers of complainant corporation and the evidence of Raymond M. Crane, do not sustain either the Findings of Fact or Conclusions of Law, that Crane

(a) Offered to sell grapes.

(b) Acted on behalf of or as agent of Kazanjian.

It is Crane's contention that

a. He offered to buy grapes for Denunzio.

b. He was the buying broker or the purchasing agent for Denunzio.

We believe the evidence of Mark Denunzio supports Crane's contentions.

Mark Denunzio,

an officer of complainant corporation, testified [Tr. p. 241] that he had discussed with Rains the telegram of September 26th and that Rains told him that the telegram called for the payment of a procurement charge to Crane and that on that date he knew that Crane was asking for a procurement commission or fee, and that Denunzio was willing to pay the procurement charge and was willing to pay Associated (Crane) for their services in procuring the grapes. [Tr. p. 242.] There was nothing in the ceiling price stipulation which said we couldn't give him a fee for making the transaction and that is what we were doing by paying him his $50.00 per car procurement charge and at that time

we understood we were paying him that money for services rendered. At the time we offered to pay him this $50.00 it was understood we were paying him for his services in procuring these grapes. [Tr. p. 244.] At that time we knew Rains offered us grapes that had been offered to him by Associated for sale and we also knew that in order to get those grapes we were going to have to pay Associated (Crane) a procurement charge. We knew that at that time. Mr. Rains told us that and we were agreeable to doing that. [Tr. pp. 250-51.]

Raymond M. Crane

testified as follows [Tr. p. 198]:

During the grape season of 1944 I visited Exeter and talked over the grape situation with Kazanjian. Kazanjian stated that he was not going to employ a distributor that year but that he would sell the grapes at his ceiling if I could secure buyers for them. At that time Kazanjian was a grower, packer and shipper and he said he would sell his grapes at his ceiling price. [Tr. pp. 199-200.] After my conversation with Kazanjian I sent wires to some of our connections who had inquired for grapes. I sent one telegram to Rains. Telegrams were sent to thirteen persons or companies. It was the telegram of September 26, 1944. [Tr. pp. 200-1.]

Under the practice followed by the produce industry the buyer pays the procurement charge. It was understood that the broker would notify the buyer that he could procure these grapes through us providing the buyer was willing to pay us a procuring charge or a buying charge, which is a standard practice, especially when there is a light supply available and a buying broker is necessary in

order to secure supplies. [Tr. p. 215.] It is an established practice among the produce industry as to whom a buying broker represents. A buying broker represents the buyer and in fact there are hundreds of buying brokers who act in that capacity in all fruit and vegetable deals, and that practice was customary during the period of time that we had O. P. A. ceilings, and I am quite sure it was engaged in by other brokers in Los Angeles. [Tr. p. 216.] In connection with the dealings involving these car lots of Emperor grapes, I did not make any offers as agent for Red Lion Packing Company or Kazanjian and I never made any offer to sell grapes to Rains or Denunzio. [Tr. pp. 220-1.] Under the O. P. A. ceiling as of December 10, 1944, a procurement charge or buyer's commission was the only way grapes were procurable and there was no provision for any profit under the ceiling and the only way that any deal could have been made is that we would act as a buyer's agent in procuring. That was the general practice and generally being done at that time on procuring grapes for eastern accounts. We were not able to make a profit as seller's agent. [Tr. pp. 221-2.]

I have known Rains since 1937. We generally sold to him as an agent for the packer or shipper. In this connection I had instructions from Rains or Denunzio which would place my dealings upon a different basis. They were the fact that we offered to buy these grapes for the buyer's account and the buyer indicated his agreement to buy on the basis we could procure the grapes and we indicated the only way we could obtain these grapes would be to act as agent for the buyer. Our authority from Denunzio was only as brought out by our communications with Rains as established by the exhibits. [Tr. pp. 222-3.]

We have never been able to reach an agreement with Kazanjian on the sale of these grapes by reason of the fact that we had never received any deposit and never received any confirmation of sale signed by the buyer as required in our communications to Rains. [Tr. p. 224.]

The foregoing testimony, together with the telegram of September 26th wherein Crane stated that he could book Emperor grapes upon terms which included a $500.00 part payment on confirmation and a charge of $50.00 brokerage charge to be paid by the purchaser, and that the offer was subject to confirmation, show beyond a doubt that Crane was acting as the agent for Denunzio and not for Kazanjian.

"Buying broker" and "procuring agent" are terms used in the produce business.

The Produce Reporter Blue Book, which is a publication followed by the produce industry, contains the following:

> " 'Buying Brokers' are special agents with authority to purchase—limited to direct instructions from their principals, and to those incidental powers which are reasonable and necessary for the accomplishment of the object of the agency."

In a case decided by the Secretary of Agriculture and reported in 6 A. D. 928 (Agricultural Decisions) a question was presented as to whom a broker represented. The seller contended that the broker was the agent of the buyer, and the buyer contended that the broker was the agent of the seller. The Secretary held that the broker was

the agent of the seller as the seller had agreed to pay the agent's brokerage.

In the case of *Adams & Dodge v. Joseph Martinelli & Co.,* 6 A. D. 1018, a question was presented as to whom the broker represented in the transaction. The Secretary held the broker to be the buying agent for the purchaser.

In the case of *W. H. Russum v. Schowker Bros. & V. E. Turner, Jr.,* 6 A. D. 583, a seller of produce filed a proceeding against the purchaser and broker. The broker contended that the purchasers authorized him to order the car of tomatoes for them. In passing on the question of agency, the Secretary referred to the case of *Western Vegetable Distributors v. Sam Krasnow,* P. A. C. A. Docket No. 2312 S-1677, where the following statement is found:

> "It has been held repeatedly that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller and receiving either an acceptance or rejection thereof."

The Secretary held the respondent Turner to be the broker for the purchaser, and dismissed the proceeding as to the broker.

In 5 A. D. 646 the Secretary stated "The evidence indicates that the broker's services were paid by the respondent partnership. It is clear that the broker was the agent of the respondent."

In the case of *Barker-Miller Distributing Co. v. Berman,* 8 Fed. Supp. 60, an action was brought in the United States District Court to enforce a liability determined by the Secretary of Agriculture. With reference to the status of the plaintiff in this proceeding the Court stated as follows:

> "Plaintiff was not attempting to sell to the defendant goods which it had acquired for its own purposes. Plaintiff went into the market and made purchases for defendant. Plaintiff was defendant's purchasing agent or broker and was paid a fee for his services in purchasing for the defendant. There was no relationship of buyer and seller despite the fact that the plaintiff advanced the purchase money at the time of obtaining the merchandise."

It would appear from the above authorities and the evidence heretofore referred to and quoted, that Crane was acting as the buying agent or procuring broker for Denunzio and was not acting as the seller's (Kazanjian's) agent.

Point II.

Crane, being the agent of the purchaser (Denunzio) could not be held responsible for the default of Kazanjian —the seller. Crane had no possession or control over the grapes belonging to Kazanjian, and Kazanjian being the one who refused to sell and deliver the grapes, Crane could under no circumstances be liable for Kazanjian's act.

Conclusion.

In conclusion we submit that the evidence in this case justifies a Finding that Crane was the agent of the purchaser and not the agent of the seller, and the Conclusion that Crane is not liable for default on the part of Kazanjian.

We feel that in the event this Court should not agree with Judge Carter's reasons for granting a dismissal of the action, still this Court should affirm the judgment of the trial court for the reason that under the evidence there is no liability on the part of Crane.

Respectfully submitted,

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Attorney for Raymond M. Crane, Doing Business as Associated Fruit Distributors of California.

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OPENING BRIEF OF APPELLANT JOSEPH DENUNZIO FRUIT COMPANY.

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OPENING BRIEF OF APPELLANT JOSEPH DENUNZIO FRUIT COMPANY.

Jurisdictional Statement.

This case involves an award by the Secretary of Agriculture under the Perishable Agricultural Commodities Act (7 U. S. C. A. 499).

Upon amended complaint by Joseph Denunzio Fruit Company [Tr. p. 17 *et seq.*] hereinafter referred to as "Denunzio," and upon answer by Raymond M. Crane, doing business as Associated Fruit Distributors [Tr. p. 49 *et seq.*] hereinafter referred to as "Crane," and answer by John C. Kazanjian, doing business as Red Lion Packing Company [Tr. p. 53 *et seq.*] hereinafter referred

to as "Kazanjian," a formal hearing was had before a judicial officer appointed by the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 7 U. S. C. A., Section 499f. Upon this hearing, the Secretary of Agriculture made an award in favor of Denunzio and against Crane to the effect that Crane shall pay Denunzio as reparation $5,723.50 with interest thereon at 5% per annum from December 10, 1944, until paid [Tr. p. 79 *et seq.*]. The complaint was dismissed as to respondent Kazanjian.

From this award of the Secretary of Agriculture, Crane appealed to the United States District Court for the Southern District of California under the provisions of the Perishable Agricultural Commodities Act, 7 U. S. C. A., Section 499g, Subdivision (c). A trial *de novo* was had in the United States District Court with the Findings of Fact and Order of the Secretary constituting *prima facie* evidence of the facts therein stated, as provided in the above cited provision of the Perishable Agricultural Commodities Act. As a result of such trial, the Honorable J. F. T. O'Connor presiding, affirmed the award of the Secretary of Agriculture [Tr. p. 150 *et seq.*].

Crane then made a motion for a new trial, and upon the decease of the Honorable J. F. T. O'Connor, the matter was assigned to the Honorable James M. Carter. Upon hearing the motion for the new trial, the court vacated the Conclusions of Law and Judgment theretofore made by the court and entered judgment setting aside the award of the Secretary of Agriculture [Tr. p. 180 *et seq.*].

From the judgment on granting motion for a new trial, both Denunzio and Crane appealed [Tr. pp. 185 and 186].

The appeals are taken to this court from the final decision of the District Court under the provisions of 28 U. S. C. A., Section 1291.

Statement of the Case.

Findings of Fact were made by the Secretary of Agriculture [Tr. p. 71 *et seq.*] and by the Honorable J. F. T. O'Connor, United States District Judge [Tr. p. 139 *et seq.*]. The Honorable James M. Carter did not make Findings of Fact but reviewed the case, without a transcript, solely on questions of law [Tr. p. 170].

The salient facts in the case, as shown by the Findings of Fact, are as follows:

The four persons involved in the transaction out of which this case arose are Crane, licensed under the Perishable Agricultural Commodities Act, as a broker and car lot distributor with offices in Los Angeles; Kazanjian, a grower and packer of grapes at Exeter, California; Denunzio, with offices at Louisville, Kentucky, a car lot receiver and wholesaler; and one A. B. Rains, Jr., with offices at Louisville, Kentucky, a food broker.

The dispute in question arose primarily by virtue of telegrams and teletype messages exchanged between Crane in Los Angeles and Rains in Louisville. These messages were in "speed code" used to facilitate the interchange of messages between brokers, sellers and purchasers. For the convenience of this court, the de-coded messages, in chronological order, are set forth in full as Appendix A to this brief. The coded messages are set forth in the transcript beginning page 31. A résumé of these messages and the other transactions resulting in this dispute is as follows:

1. Original Offer.

On or about September 26, 1944, Kazanjian advised Crane that he had some grapes to offer for sale [Tr. p. 70].

Thereupon, on September 26, 1944, Crane sent a form night letter to thirteen brokers in various parts of the United States, including A. B. Rains [Tr. p. 201], in which he stated he could book nine cars of U. S. One and nine cars of unclassified Emperor grapes at a price of $2.53 net to shipper "we charging $50.00 per car procurement charge—offer subject to confirmation."

2. Counter Offer by Denunzio.

On September 28, 1944, Rains made a counter offer to Crane by teletype wherein he stated that Denunzio would take two cars of unclassified and two cars of U. S. One to be stored there on Crane's terms and to pay him $50.00.

3. Rejection of Counter Offer.

By night letter telegram dated September 28, 1944, Crane rejected Denunzio's counter offer.

4. Revised Offer.

Then on October 2, 1944, Crane telegraphed Rains and other brokers that in reference to his night letter of September 26th quoting futures on Emperors, he had secured a revised deal and that he could sell fifteen cars of U. S. No. One Emperor grapes on the same basis with respect to packing, storing, shipping and inspection as set forth in the original wire, but at a price of $2.50 per lug net.

5. Acceptance of Revised Offer.

By teletype on October 3, 1944, Rains accepted on behalf of Denunzio for three cars of U. S. No. One Emperors to be inspected when stored and inspection slips airmailed, $750.00 per car deposits to be put up contingent upon receiving inspection reports when the grapes are stored.

6. Confirmation of Acceptance.

By immediate reply teletype, Crane confirmed Denunzio's acceptance.

7. Subsequent Reduction of Contract to Formalized Agreement "Brokers Standard Memorandum of Sale."

Thereupon, on October 3, 1944, Rains prepared in triplicate a broker's standard memorandum of sale No. 2011 confirming the transaction and sent the "Seller's" copy to Crane. At the top of this standard memorandum of sale appears the following statement:

> "When the terms of sale have been agreed upon, the broker shall fill out this standard memorandum of sale in triplicate, sending one copy to the seller, one to the buyer and retaining the third copy for his own file. Unless the seller or the buyer makes immediate objection upon receipt of his copy of this standard memorandum of sale, showing that contract was made contrary to authority given the broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated." [Tr. p. 29.]

The standard memorandum of sale shows the sale to Joseph Denunzio Fruit Company, sold for account of Associated Fruit Distributors, and states the sale to be:

> "Two cars U. S. #1 California Emperors per lug F.O.B. net $2.50 to be packed around October 8th to 10th and stored in cold storage title to remain in shipper's name until December 10th $750.00 per car deposit to be made upon receipt of confirmation from California by airmail—contingent upon cars grading U. S. #1 28 lb. net new display lugs."

8. Correction of Memorandum of Sale.

On October 9, 1944, Rains sent a telegram to Crane stating that in reference to sales memo 2011 there was an error and it should read three cars instead of two cars.

9. Correction Accepted.

Crane replied by telegram to Rains on the same date accepting the correction of No. 2011, adding a further correction that the terms are F.O.B. acceptance final and stating that "if you do not wire immediately to the contrary, we will understand this is satisfactory." No further telegram or other communication was sent by either party concerning these corrections.

10. Removal of Price Ceilings.

On October 10, 1944, the Office of Price Administration removed all maximum price restrictions from table grapes.

11. Repudiation of Contract on Behalf of Kazanjian.

On October 10, 1944, Crane sent to Rains the following telegram:

> "Shipper Red Lion takes view account ceiling lifted any contracts Emperors voided. Willing go along give you trade preference shipping as packed at market price which today $3.25 F.O.B. acceptance final. Advise."

To this, Rains telegraphed to Crane on October 11, 1944, as follows:

> "Baloney. Emperors confirmed $2.50 net. No mention ceiling. Denunzio Krotzki demands shipment or fight him to end . . ."

12. Repudiation of Contract by Crane.

On October 13th, Crane sent a telegram to Rains stating that because the deal was "F.O.B. acceptance final not F.O.B." there was really no contract. (Actually this point had been straightened out in the exchange of telegrams October 9th.)

No settlement was reached. By October 12th, the price was up to $3.40 per lug [Tr. p. 39] and it continued to climb.

This was an anticipatory breach of a sale to take place on or about December 10, 1944. Until that date, Denunzio endeavored to force compliance with the contract and sought the aid of the Department of Agriculture to force such compliance. After December 10th, when the breach actually occurred, Denunzio went out into the open mar-

ket and as soon as possible and at the best market price obtainable bought other grapes as replacements for those not shipped by Crane. Three cars were purchased at a total purchase price of $14,011.00, which sum exceeded the contract purchase price for the three cars by $5,723.50.

Denunzio petitioned the Secretary of Agriculture for reparation in the amount of its loss because of the failure of Crane or Kazanjian to perform in accordance with the agreement. Crane and Kazanjian answered separately but in essence set up the defense that no enforceable contract was ever concluded.

For the first time after appeal to the District Court, Crane set up his contention that if a contract was in fact concluded, it was illegal as being in excess of O.P.A. ceilings.

Since Judge O'Connor found that a contract was concluded between Denunzio and Crane and these Findings were not disturbed by Judge Carter, this appeal by Denunzio does not involve those points.

This appeal by Denunzio involves only the conclusions by Judge Carter (a) that the contract between Crane as agent for an undisclosed principal and Denunzio violated the Emergency Price Control Act and maximum price regulations *in toto*; (b) that consequently such contract was totally unenforceable; and (c) because of conclusions (a) and (b) above, the judgment of the District Court made by Judge O'Connor was legally unsupportable and must be set aside.

Specification of Errors.

1. The lower court erred in its Conclusion of Law No. 1 that the motion for a new trial filed by Crane should be granted and an order should be made herein setting aside, vacating and annulling the Findings of Fact and Conclusions of Law and Judgment signed and filed herein on the 21st day of July, 1948.

2. The lower court erred in its Conclusion of Law No. IV in determining the veiling price for said grapes to be $2.50 per lug and in failing to segregate the consideration payable to the principal, Kazanjian, and the additional compensation claimed by the agent, Crane.

3. The lower court erred in its Conclusion of Law No. V concluding that the contract referred to in Paragraph II of the Findings of Fact was unlawful and void under the Emergency Price Control Act of 1942 as amended.

4. The lower court erred in its Conclusion of Law No. VI concluding that the contract referred to in Paragraph II of the Findings of Fact was illegal and void and that no further proceedings thereunder should be had.

5. The lower court erred in its Conclusion of Law No. VII that Crane and Kazanjian are entitled to judgment against the complainant Denunzio to the effect that Denunzio take no relief under the cause of action set forth in its complaint.

6. The lower court erred in entering judgment on May 19, 1950 (on granting motion for a new trial) vacat-

ing and annulling and setting aside the Findings of Fact, Conclusions of Law, and Judgment signed and filed in these proceedings on July 21, 1948, and further determining that the contract referred to in Paragraph II of the Findings of Fact is void and in ordering, adjudging and decreeing that complainant Denunzio take no relief as against respondent Crane, and as against respondent Kazanjian.

Summary of Argument.

Judge Carter set aside the Judgment in this case made by Judge O'Connor solely on the grounds that the contract between Crane as agent for an undisclosed principal and Denunzio was in violation of the Emergency Price Control Act of 1942, and unenforceable.

We believe this conclusion was wrong:

1. Because Judge Carter erroneously determined that the applicable price ceiling was $2.50 per lug instead of $2.53 per lug.

2. Because the applicable price ceiling being $2.53 per lug, a contract calling for a purchase price of $2.50 per *lug* and providing for $50.00 per *car* brokerage is not on its face in violation of the law. A contract is presumed to be lawful and if on its face it is not unlawful, then it is up to the party claiming its invalidity *to introduce evidence* to prove that contention. Illegality should not be presumed or arrived at by implication.

3. If it be assumed or deduced to the satisfaction of this court that $2.50 per lug plus $50.00 per car amounted to more than the applicable ceiling price; still it does not follow that the contract as a whole is unenforceable because:

(a) The Emergency Price Control Act sets forth the penalties for its violation; such penalties do not include unenforceability.

(b) When the violation of the Emergency Price Control Act is of a technical, unintentional and exceedingly minor nature the court should not apply a remedy other than that provided by the Act itself.

(c) The brokerage of $50.00 per car is not earned or payable until the broker has brought about a contract between the principals; therefore, the $50.00 per car is a secondary contract which if payable at all must be *added* to the basic contract. It is therefore the *added* commission that is the illegal portion of the contract. Since there is a separate consideration that supports this promise, it is severable and the remaining legal portion of the contract may be enforced.

ARGUMENT.

I.

The Applicable Maximum Ceiling Price for Emperor Grapes was $2.53 Per Lug, Not $2.50 Per Lug.

Judge O'Connor in his Findings found the applicable maximum ceiling price to be $2.53 per lug [Finding of Fact II, Tr. p. 140]. Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug [Tr. p. 166]. If the ceiling price were $2.50 per lug, then an added procurement charge of $50.00 *per car* would of necessity make the total price over the legal ceiling. In such case, the illegality would be apparent on the face of the contract. On the other hand, if the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 *per car* would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a contract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the respondent Crane failed to do.

The regulation of the Office of Price Administration applicable to this contract was MPR 426, Amendment 46, August 2, 1944. The second page of this regulation sets forth the basic price for "table grapes produced in all other areas (other than Riverside and Imperial Counties of California and in Arizona) and packed in lug boxes (WPB L 232 No. 46) with a net weight of 28 lbs. or

more, sold between December 11th and the end of the season at $2.40 per lug. This far all parties interpret the regulation the same.

The third page of the regulation provides for "maximum mark-ups for distributive services performed by grower-packers, shipping point distributors, and their agents to be added to the applicable maximum price F.O.B. shipping point or the maximum delivered price, as the case may be." Column 2 gives the commodity—"table grapes"; column 3 gives the unit—"lug book (box) with a net weight of 28 lbs. or more"; columns 8 to 12, inclusive, provide for "sales by *any person* (including grower-packers) through a growers' sales agent and sales by shipping point distributors"; column 8 provides for mark-up in case of "direct sales (without the use of broker or any other agent)" and provides for a mark-up of 10¢; column 9 provides for mark-up for a sale "through a broker or salaried representative in any quantity, or through a commission merchant in car lots or truck lots" of 13¢ per lug. It is obvious that column 9 indicates the proper mark-up in the present situation where the sale was handled in car lots through commission merchant respondent Crane. Therefore, it is apparent that the ceiling price applicable to this transaction was $2.53.

II.
A Contract Is Presumed to Be Lawful.

Section 1643 of the Civil Code of California provides as follows:

> "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Howard v. Adams,* 16 Cal. 2d 253, at page 256, 105 P. 2d 971, 130 A. L. R. 1003, the court states:

> "The principal contention urged on this appeal is that the agreement was void as against public policy and therefore the trial court erred in permitting plaintiff to recover upon it. Bearing in mind the rule that a contract should, if possible, be construed to make it valid and enforceable, we cannot agree that illegality is established."

The law presumes in favor of the validity of contracts. This has been the law in California since *Shaver v. Bear River and Auburn W & M Company,* 10 Cal. 396 (1858).*

Parties are to be given the widest latitude to make contracts with reference to their private interests and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. (*Herriman v. Menzies,* 115 Cal. 16, 44 Pac. 660, 35 L. R. A. 318.)

All intendments being against fraud and in favor of fair dealing, it will not be presumed against any writing that it contemplates a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument. (*Wood v. Woods Estate,* 137 Cal. 148, 69 Pac. 981.)

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*Counsel stipulated that the substantive law of the State of California (statutory and case) shall control [Tr. p. 96].

III.

If the Illegality Does Not Appear Upon the Face of the Contract, Then It Must Be Alleged and Proven.

In *Bernard v. Sloan,* 2 Cal. App. 737, 84 Pac. 232, the law is stated at page 748 as follows:

> "The claim of the defendants that their contract with Braslan is illegal, by reason of being in restraint of trade and against public policy, is not pleaded in their answer in such a mode as to present such defense. Parties are allowed great latitude and freedom of action in making contracts with each other, and no presumption can be indulged that a contract which has no semblance of illegality in its terms is violative of any law."

In this brief, we are not speaking of a situation in which illegality is apparent upon the face of the contract. If such illegality is apparent, then the court itself may refuse to entertain the action. We are speaking of a situation in which a reading of the contract alone will not disclose any illegality.

In *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, plaintiff sued on a contract to furnish equipment and labor for the performance of work in installing electric wiring and other equipment. Defendant set up the claim that such a contract, if entered into, was illegal and void as in violation of the regulations of the Office of Price Administration. At page 542, the court states:

> "Appellant's contention that the contract is in violation of the regulations of the Office of Price Administration by reason of the fact that it provided for charges for the use of respondent's equipment not allowed by said regulations, is not sustained by the rec-

ord. It is presumed 'that private transactions have been fair and regular' and 'that the law has been obeyed.' (Code of Civil Procedure Section 1963, Subdivision 19 and 33.) The contract is valid on its face. If facts existed that tended to prove its invalidity and to overcome the presumption, the burden rested upon appellant to prove such facts. He failed to do so."

In *Gelb v. Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, plaintiff sued for a bonus due him as manager of the Fresno branch of defendant's business. The defendant relied upon the defense that there was no agreement to pay this bonus and judgment went for the plaintiff. On appeal, the defendant for the first time set up a contention that the contract sued upon was contrary to the provisions of the Emergency Price Control Act of 1942, as amended, and that it was, therefore, illegal and unenforceable. Beginning at page 883, the court states:

"This defense is raised for the first time on appeal and it was in no way pleaded or presented in the trial court. The Price Control Regulations relied on contain a number of exceptions, and no evidence having been received in this connection, there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here.

"While the appellants contend that the question of illegality may be raised at any time, this is true only where the illegality clearly appears. The facts alleged in the complaint in this action do not show on their face that the contract sued upon was unlawful. Under such circumstances, *illegality is an affirmative defense that must be specially pleaded. Bernstein v. Downes,* 112 Cal. 197, 44 Pac. 557." (Emphasis added.)

IV.

No Evidence of Illegality of Contract Introduced.

In the instant case, no illegality is shown on the face of the contract nor has an affirmative defense of illegality been raised by amended answer, nor has evidence of illegality been introduced. The only evidence on the number of lugs in a car load of Emperor grapes is the evidence of the number of lugs that went into the replacement cars. The replacement car purchase from Simons & French Company contained 1100 lugs [Tr. p. 42]. The replacement cars purchased from A. Arena & Co., Ltd. each contained 1105 lugs [Tr. pp. 47 and 48]. If the court is willing to assume that the three cars to be supplied by Crane were each to contain 1100 lugs, this would make the commission to Crane amount to approximately 4½¢ per lug. We don't believe that the court is justified in making this assumption if the result is to declare the whole contract null and void. We submit that if the respondent Crane desires such a result, he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or to submit evidence of maximum and minimum loadings under the tariff regulations of the various loading points and destination points and the extent to which these were modified by emergency regulations during the war. This he did not do. Also M. P. R. 426, Section 13, provides for "adjustable pricing" under certain circumstances. There is no evidence that this case did not come within such an exception or any other exception to the maximum price regulation.

V.

Contract Could Not Exceed O. P. A. Price Regulation by More Than Six One Hundredths of One Per Cent.

If the court does feel justified in assuming that the contract contemplated cars of 1100 lugs each, and further feels justified in assuming the sale did not come within an exception to the $2.53 per lug maximum price, then $2.53 per lug amounted to $2,783.00 per car while the price to be charged Denunzio for a car of Emperor grapes plus commission (based upon this same assumption of 1100 lugs to a car) was $2,800.00 or a possible overcharge of $17.00. This is a maximum possible overcharge of approximately six one hundredths of one per cent. Respondent Crane is asking that the whole transaction be declared null and void because of such a minor, technical and unintentional overcharge.

VI.

The Emergency Price Control Act of 1942, as Amended, Sets Forth the Penalties for Its Violation. Such Penalties Do Not Include Unenforceability of a Contract in Violation Thereof.

(a) The Unenforceability of Contracts in Violation of Statute as Affected by Legislative Intent.

A contract in violation of the Emergency Price Control Act of 1942, as amended, is not unenforceable. The statute itself sets forth the remedies for such violation.

As pointed out by Judge O'Connor in his opinion in the instant case [Tr. p. 124] a contract in violation of a statute

is not necessarily void or unenforceable, and whether such a result is reached by the court depends upon its interpretation of the intent of the legislative body enacting the statute. In *Bentley v. Hurlbut,* 153 Cal. 796, 96 Pac. 890, the court quotes at page 801 from a decision of the United States Supreme Court as follows:

> "In *Harris v. Runnels,* 12 How. (U. S.) 79, 53 U. S. 79, 13 L. Ed. 901, the Supreme Court of the United States said: 'Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so.' While the statute here under consideration has not been construed by this court, statutes substantially similar have been brought for interpretation before the courts of other states. In a majority of the cases it has been held that a contract of sale made in violation of such a statute was not void, and that the vendor could recover the purchase price in an action on the contract."

Other cases supporting this proposition of law are:

Gammon v. Howard W. Scott, Inc., 4 Cir., 16 F. 2d 902;

Macco Construction Company v. Farr, 9 Cir., 137 F. 2d 52;

McBroom v. Scottish Mortgage & Land Investment Company, 153 U. S. 318, 323, 14 Sup. Ct. 852, 854, 38 L. Ed. 729.

(b) Legislative History of Emergency Price Control Act.

An examination of the legislative history of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Section 901 *et seq.*) shows that the House of Representatives' version of the bill provided a special section in which contracts in violation of the price ceilings established under the bill are "unenforceable." The Senate version of the bill did not contain this provision but contained four specific methods of enforcement of the Act: (1) injunction; (2) criminal penalties for wilful violations; (3) suit for damages; and (4) issuance of licenses and revocation thereof in case of more than one violation. After conference between the Senate and the House, the Senate version was adopted and was signed into law. The details of the history of the bill on this point are as follows:

The House report on its version of the bill is designated as "77th Congress, 2nd Session, House Report No. 1409, November 7, 1941." It can be found in Pike and Fischer, OPA Price Service—General Desk Book, Volume 1, as follows:

> "Mr. Steagall, from the Committee on Banking and Currency, submitted the following report to accompany H. R. 5990: . . .
>
> 'Contract Obligations.
>
> 'Section 206 makes *unenforceable* certain contracts and contract provisions inconsistent with, or conflicting with, or providing means of evasion of, price ceilings established under the provisions of the bill or established by the administrator of the Office of Price Administration and Civilian Supply.'" (Emphasis added.)

(Note that this Section 206 appearing in the House bill does not appear in the final version of the Act.)

The Senate report on its version of the bill is designated "77th Congress, 2nd Session, Senate Report No. 931, January 2, 1942." It can be found at page 1215 of Pike and Fischer, OPA Price Service, General Desk Book, Volume 1, as follows:

> "The House bill contained a provision making unlawful contracts requiring the payment of prices in excess of the maximum prices which had been established at the time such contracts were entered into or which were thereafter established. This the committee regarded as unduly restrictive, especially in connection with War and Navy Department contracts. *Accordingly, that provision has been deleted so that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices.*" (Emphasis added.)

The Senate version of the bill was adopted by the Congress and signed into law by the President. The section 206 of the House bill was deleted.

The legislation as it finally became law, then, provided, in the words of the Senate report, *supra,* "that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."

The applicable regulation in the instant case—M. P. R. 426—"Fresh fruits and vegetables for table use, sales except at retail"—provides as follows:

> "Section 9, Enforcement. Persons violating any provisions of this regulation are subject to criminal

penalties, *civil enforcement actions,* suits for treble damages and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942, as amended." (Emphasis added.)

M. P. R. 426 does not declare void any contract for the sale of any commodity over ceiling price. See Section 7, M. P. R. 426.

(c) Decisions on Unenforceability of Contracts Under the Emergency Price Control Act.

Judge Carter, in his opinion on the case below, relied strongly upon the holding in *Morgan Ice Company v. Barfield,* Texas Civil Appeal 1945, 190 S. W. 2d 847. The *Morgan Ice Company* case was decided by one of the eleven Courts of Civil Appeal of Texas. It has been cited and distinguished by the Supreme Court of Texas (the ultimate court of appeal in Texas) in its decision in *Miller v. Long Bell Lumber Co.* (1949), 222 S. W. 2d 244.

In the *Long Bell Lumber Co.* case, the lumber company sued for lumber supplied the defendant on 550 invoices totaling $12,906.17. Miller defended upon the grounds that 61 of these invoices were over the applicable maximum price ceilings and that therefore (a) either the transactions as a whole were illegal and void, or (b) that the transactions involving the 61 invoices over ceiling prices were illegal and void. The court refused to declare any portion of the contract void, but did deduct from the amount due the total amount of the overcharge on these 61 items in the sum of $790.69.

The first thing that the court did was to distinguish those cases in which the contract indicated an intent to violate or evade the maximum price regulations from the *Long Bell* case which involved an incidental, unintentional

and minor violation in an otherwise legitimate business transaction. On this point, the court states at page 246 as follows:

> "There are two cases cited by petitioner by Courts of Civil Appeals in Texas which were decided upon certain violations of the regulations of the Office of Price Administration. *Morgan Ice Company v. Barfield,* Texas Civil Appeal, 190 Southwestern (2d) 847; *A. B. Lewis Co. v. Jackson,* Texas Civil Appeal, 199 Southwestern (2d) 853. In each of those cases the court refused to enforce the contract, which was held void under maximum price provisions of the Emergency Price Control Act, on the basis that in each case the parties entered into a contract which was in violation of the law. In the first case the contract was entered into in violation of the law and for the purpose of defeating the provisions of the statute; in the other case the court held that the transaction was fabricated and in violation of law. Relief was denied in each instance to the party seeking same. In the instant case the sale of merchandise in question was not illegal in itself. The illegality of the transaction, if any, consisted in the fact that an overcharge was made on certain specified articles of merchandise."

And at page 248, the court concludes as follows:

> "We are of the opinion that the Emergency Price Control Act considered as a whole cannot be construed to mean that in cases of an unintentional violation, as here, of some portion of its provisions by a transaction not inherently unlawful that any other penalty or forfeiture can be applied than that which is prescribed in the act. The general rule as to the nonenforceability of illegal contracts is not applicable; the illegality is not of that character which renders void the act done."

(d) Decisions on Enforceability of Contracts in Violation of Similarly Worded Statutes.

Probably the best statement of the law, and in a case most applicable to the instant one, is in *Macco Construction Co. v. Farr,* 137 F. 2d 52, decided by the Ninth Circuit in 1943. In this case the plaintiffs entered into an oral agreement to furnish four automobile trucks and personal services in their operation and the defendants agreed to hire the same for the entire duration of a certain grading and excavation project of defendants; thereafter the defendants without cause discharged the plaintiffs and refused to allow them to continue performance of the contract. On appeal, appellant Macco Construction Co.'s principal contention was that as a matter of law appellees were not entitled to recover because they had obtained no permit from the Railroad Commission of the State of California. Such a permit was required by virtue of the City Carriers Act No. 5134, Deering's General Laws of the State of California, Statutes of 1935, as amended.

At page 54, the court states:

> "The California City Carriers Act specifically provides penalties for its violation. Certain of these are denominated 'criminal penalties', Section 13, and others designated 'civil penalties', Section 14. Where the legislature thus particularly enumerated these penalties we must not assume that some others not named were intended to be included. The act does not declare that a contract entered into or executed between the parties which involved the use of highways in transporting materials was void because no permit had been secured."

Further at page 54, the court states:

"It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum per se,* but appellant insists that the decisions of the California courts hold that where a statute provides a penalty for an act, a contract founded on such an act is void although the statute does not pronounce it void or expressly prohibit it, and cites in support of its position: *City of Los Angeles v. Waterson,* 8 Cal. App. (2d) 331, 48 Pac. (2d) 87; *Holm v. Bramwell,* 20 Cal. App. (2d) 332, 67 Pac. (2d) 114. The contracts in these cases cited, as a reading of the decisions shows, are very different from the one we are here considering. In the Waterson case, the contract was entered into fraudulently for the purpose of evading the law. . . . In *Holm v. Bramwell, supra,* there is involved the contractor's license law of California, Section 12 of which specifically provides: 'No person engaged in the business or acting in the capacity of a contractor as defined by Section 3 of this Act, shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose.' . . . There is no such provision in the City Carriers Act No. 5134."

At page 56, the court concludes:

"It is always the purpose of the law to avoid absurdities, injustice and hardship. We may be sure it never was the legislative intent that beneficiaries of the violation, particularly if they themselves were instrumental in bringing about the breach, should thus be relieved from the just obligation of their contracts."

A case very much in point is *Bruce's Juices v. American Can Company,* 330 U. S. 743, 67 Sup. Ct. 1015, 91 L. Ed. 1219. This involved the enforcement of a contract claimed by the defendant to be in violation of the Robinson-Patman Act, 49 Statutes 1526, 1528; 15 U. S. C. A., Sections 13 and 13(a). Bruce was a canner who over a period of years bought its cans chiefly from the American Can Company. This suit was brought for the balance due. It was claimed that the American Can Company gave graduated discounts depending upon the number of cans bought and this was *per se* a violation of the Robinson-Patman Act. At page 750, the court, speaking through Justice Jackson, states:

> "The act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the act is made criminal and upon conviction a violator may be fined or imprisoned. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. This triple damage provision to re-dress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the act made no provision for it;"

At page 755, the court further states:

> "This court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the court will entertain the defense that the contract in suit is illegal under the express provision of that statute. (Citing cases.) But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that where a statute creates a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'" (Citing cases.)

There have been many cases on whether sales in violation of licensing statutes are unenforceable. These cases are not directly applicable to the instant case in that the contract for sale involved herein was not in violation of any licensing provision of the Emergency Price Control Act—no licenses having been issued. The most recent annotation on this subject, however, is in 118 A. L. R. 646, in which the following statement appears:

> "In a considerable number of the recent cases, stress or reliance appears to be placed upon the absence of any specific provision declaring void or unenforceable a contract of an unlicensed person."

The case preceding the annotation is *Rosasco Creameries v. Cohan,* 118 A. L. R. 641, 276 N. Y. 274, 11 N. E. 2d 908. At page 644, the court states:

> "If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, Volume 3, Section 1789; Volume 5 (Second Edition), Section 1630. *Cf.* American Law Institute, Re-statement of the Law of Contracts, Sections 548, 600."

VII.

The Court May Use Its Discretion in Applying the Statutory Remedies Provided by the Emergency Price Control Act and a Fortiori May Use Its Discretion in Applying a Remedy Not Called for by the Statute.

During the course of the administration of the Emergency Price Control Act of 1942, as amended, the courts weighed the problem of whether they were required, upon the application of the administrator, to apply the statutory remedy sought by him or whether the courts had some discretion in the application of these remedies. The point was finally decided by the United States Supreme Court in *Hecht Co. v. Bowles,* 321 U. S. 321, 64 Sup. Ct. 587, 88 L. Ed. 754. In that case, the administrator had asked for an injunction against the department store in Washington, D. C. operated by the defendant. The District Court concluded that the "mistakes in pricing and listing were

all made in good faith and without intent to violate the regulations" and in the exercise of its discretion refused to grant an injunction (49 Fed. Supp. 528). On appeal, the Court of Appeals for the District of Columbia reversed that judgment holding that Section 205(a) of the Act required the issuance of an injunction or other order as a matter of course, once violations were found (137 F. 2d 689). On certiorari, the United States Supreme Court reversed the Court of Appeals for the District of Columbia on this point and at page 328 held:

> "It seems apparent on the face of Section 205(a) that there is some room for the exercise of discretion on the part of the court. . . . it would seem clear that the court might deem some 'other order' more appropriate for the evil at hand than the one which was sought. We cannot say that it lacks the power to make that choice. Thus it seems that Section 205 (a) falls short of making mandatory the issuance of an injunction merely because the administrator asks it."

There have been many lower court decisions in line with the decision of the Supreme Court in the *Hecht Co.* case.

In *Brown v. W. R. McNeil, Inc.,* 52 Fed. Supp. 485, the court held that what type of order should be issued upon a showing that a person has engaged or is about to engage in an act or practice in violation of Section 901 is discretionary with the District Court.

In *Brown v. Southwest Hotel,* 50 Fed. Supp. 147, the court held that although it was required to issue some or-

der, it was not necessarily required to issue an injunction and may exercise some discretion as to the type of order.

In *Bowles v. Virginia Hotel,* 55 Fed. Supp. 1013, the court in the exercise of its discretion refused to enjoin a hotel from charging rent for hotel rooms above maximum rent established, where the hotel owner had failed to make a proper entry of names of registration cards on less than 1% of the registrations made and the hotel owner had acted in good faith.

In *Bowles v. Arlington Furniture Company,* 148 F. 2d 467, it was held that the issuance of an injunction would constitute an abuse of discretion, where the seller and buyer of used woodworking machinery violated maximum price regulations but such violation was technical and largely as a result of an honest difference of opinion as to the proper interpretation of the regulation.

If the courts are clothed with such discretion in applying the statutory remedies provided by Congress for the enforcement of the Emergency Price Control Act, then certainly the courts have discretion in applying a remedy not called for by the Act. If the court in the exercise of its discretion may refuse to grant an injunction at the instance of the administrator, when such a remedy is specifically provided for under the Act, it can refuse to declare a contract unenforceable at the instance of the defaulting party, when such remedy is not provided for under the Act and does not appear proper under the circumstances.

VIII.

In Any Case the Contract Is Severable and the Legal Portion May Be Enforced.

In *Hedges v. Frink,* 174 Cal. 552 at page 554, 163 Pac. 884, the court states:

> "It is both familiar and declared law (Civil Code Sec. 1599) that where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the rest."

See also *Poultry Producers v. Barlow,* 189 Cal. 278, 285, 208 Pac. 93.

Judge O'Connor states in his opinion [Tr. p. 126] as follows:

> "but assuming that counsel for Raymond M. Crane is correct in his contention that an entire and inseparable contract violating OPA ceiling prices would be illegal and unenforceable, *in toto* where one party was receiving the overcharge, it seems to the court that counsel loses sight of the fact that the contract here for the sale of grapes involved (1) Raymond M. Crane, acting in two different capacities, (2) at least two different subject matters, and (3) two different and separate considerations, each for a particular and separate purpose."

Judge Carter, while noting the right of a party to enforce the legal portion of a contract under California Civil Code, Section 1599, concluded [Tr. p. 168]:

> "There is no logical theory on which it can be said that the procurement fee alone was illegal and the contract for the grapes legal, anymore than the reverse could be said to be true, namely, that the

procurement fee was legal and the price of the grapes illegal."

But brokerage is not earned unless the contract for sale is completed; a brokerage agreement is supplemental and additional to the contract of sale.

There can be a contract for the purchase of grapes without a contract for brokerage; there can be no contract for brokerage without a contract for sale. In the instant case, Crane purported to close a contract with Rains, Denunzio's broker, for three cars of Emperor grapes to be packed around October 8th to 10th, to remain in shipper's name until on or about December 10th, $750.00 per car deposit to be made upon receipt of confirmation from California by airmail—contingent upon cars grading U. S. No. One 28 lb. net new display lugs. This contract was not in violation of any OPA regulations. The supplemental contract providing for a $50.00 per car procurement charge was payable only if Crane performed under the primary contract and brought the principals (Denunzio and Crane) together in a contract of sale binding upon both principals. This Crane did not do [Tr. p. 148]. The law on this point is set forth in 4 Cal. Jur. 584 as follows:

> "The expression most commonly used in the books to describe the duty of the broker to perform the terms of his contract before his right to commission accrues is that he must be the procuring or inducing cause of the sale or purchase. The duty assumed by him is to bring buyer and seller to an agreement, *and until this is done his right to commission does not accrue.*" (Emphasis added.)

The brokerage is an additional sum payable if a contract binding upon the principals is completed.

In order to earn the commission, Crane was required to procure a customer on the terms authorized by Kazanjian. In 4 Cal. Jur. 593, the law on this point is stated as follows:

> "Where the broker is authorized to make a sale or procure a purchaser on certain specified terms, he has no authority to make a sale on other and different terms for the owner, and in the absence of express acceptance thereof by the owner, the broker has not earned, and cannot recover, his commission."

In *Andrews v. Waldo,* 205 Cal. 764, 272 Pac. 1052, plaintiff, as a broker, brought an action for recovery of his commission. The evidence showed that he had been appointed to sell the property at a specified price, payable in a stated sum in cash and the balance to be secured by a mortgage. The written contract of purchase as obtained by the broker provided for the cash payment and the balance secured by a mortgage, but gave the purchaser 30 days after notice from the owner that the escrow was ready to be closed within which to make the cash payment. The court granted a non-suit holding that the broker had not complied with the terms of the seller in that the cash was not payable immediately but only 30 days after close of escrow, and therefore the commission had not been earned.

From the above, two propositions of law are evident: (1) that a contract for a commission is supplemental to

and dependent upon the contract of sale, and (2) that if the contract of sale arranged by the broker is not within the terms of his authority from the seller, the commission is never earned.

It is apparent that the illegality, if any, in the transaction in the instant case was not in the price at which the grapes were offered and accepted, but in the supplemental agreement, that if Crane arranged a binding sale between his undisclosed principal and Denunzio, then Denunzio would also pay $50.00 per car to Crane. It was this added amount, if anything, which brought the total sales price above the maximum ceiling price. Of course, in any case, the brokerage was not earned (4 Cal. Jur. 485) and is not payable by Denunzio, but our point here is that its part in the transaction was that of a supplemental agreement to the primary agreement of sale and the amount involved in the brokerage was the amount that brought the transaction over the ceiling price (assuming that the total amount payable was over the ceiling price).

The brokerage being the excessive part of the transaction and representing a separate promise for a separate consideration should be severed from the agreement for the sale and purchase of the grapes at an admittedly legal price. (*Fitzgerald v. Union Central Life Insurance Co.*, (8th Cir., 1930), 42 F. 2d 76.)

Conclusion.

In conclusion, appellant Denunzio submits:

1. The legislative history of the Emergency Price Control Act of 1942, as amended, leads to the conclusion that Congress intended to expressly enumerate those penalties applicable for its violation; while the remedy of unenforceability was considered by Congress, it was not adopted. In the case of an inherently lawful transaction (as opposed to a conspiracy to violate the act which is *malum per se*) Congress did not intend such transaction to be unenforceable.

2. Where, as in the instant case, the contract is not unlawful on its face, the court will not presume or imply that it is contrary to statute and the burden is placed upon the party asserting its invalidity to plead and introduce evidence to prove that the total price exceeds the applicable maximum price ceiling and that the contract does not come within any exception thereto.

3. In the application of the enumerated remedies under the act, the courts are given discretion to apply or refuse to apply a given remedy, taking into consideration the magnitude of the violation, whether it was intentional or unintentional and whether it constituted a part of a conspiracy to violate the act or was a part of an inherently lawful transaction. Since the court has discretion in refusing to apply the enumerated penalties, it is clothed with even greater discretion in refusing to apply an additional penalty not enumerated in the act. Where, as here, the maximum possible violation is six one-hundredths

of one per cent over ceiling price and the violation, if any, is unintentional and as a part of a lawful transaction, Judge O'Connor, who heard the evidence, did not abuse his discretion in refusing to declare the contract unenforceable at the instance of the party in default and Judge Carter erred in declaring the contract unenforceable as a matter of law.

4. The transaction here involved comprises an agreement between the agent of an undisclosed principal and Denunzio to buy and sell grapes at under the ceiling price. The supplemental agreement is between the same agent and Denunzio, that if Crane concludes such a binding contract, Denunzio will pay him $50.00 per car. This brokerage agreement is supplemental to the making of the contract to buy and sell and consequently is the part of this transaction, if any, which exceeds the ceiling. Being severable, it should be severed, and the balance of the contract enforced.

Respectfully submitted,

Moss, Lyon & Dunn,

By George C. Lyon,

Attorneys for Appellant Joseph Denunzio Fruit Co.

APPENDIX.

Telegrams and Teletypes Passing Between Crane and Rains.

(Code words are written out and words are written in full instead of abbreviations.)

1. Night letter dated September 26, 1944, from Crane to various brokers, including A. B. Rains of Louisville, Ky.:

> "Can book Emperors—nine cars U S One and nine cars unclassified or 18 cars—Vineyard run grade—to go into storage—Packing to commence rate of one or two daily October 9th—We to personally inspect AFOHD (F.O.B. acceptance final) basis our inspection—Shipper to transfer title on or after December 10th he paying all storage charges. Packed 28# net—Display new lugs lidded—Calripe or comparable brand—$500 part payment with confirmation—price 2.53 net to shipper which ceiling that time—we charging 50.00 per car procurement charge—ADLAM (offered subject to confirmation) CORLU (wire immediately, must have answer) Thursday. ADLAS (offer subject to confirmation shipping point) immediate UPTMU (tomatoes 6 x 6 and larger—New crop Edson District—ALBIQ (approximately 85%) 3.25—Can secure 3-4 cars uninspected account (because of) heavy puff heavy sidewalls. Would grade AIBIEIQ (approximately 80-85%) except for puff which is not a serious defect account of heavy sidewall 2.50."

2. On September 28, 1944, the following teletype messages passed between Rains and Crane:

Rains to Crane—OK on that Emperor deal—De nunzio cant use that many but will take 2 cars un-

classified to be shipped to Louisville when packed on the net delivered ceiling when shipped and 2 cars U S One to be stored there on your terms—To pay you 50.00 per car buying charges and Denunzio pays us our brokerage.

Crane to Rains—We will have to put that up to the shipper as deal was based exactly as we told you—By the way tomato market still good New York with quite heavy arrivals. Did 4.50 to 5.50 Calif., so get busy. Will let you know Emperors. End. Well idea is they dont like to store unclassified and unless grower is making something extra on the storage—Dont see any objections 500.00 per car deposit when confirmed—Get it pal and call us back teletype.

Rains to Crane—Denunzio has plenty of tomatoes at present but promise us first chance next one other not using car—Lots yet—End.

3. On September 28, 1944, Crane sent a night letter to Rains as follows:

Referring Emperors impossible make deal except as quoted our niteletter—DUPUR (how about) tomato business—others buying DUNNE (depending on you)—those we favor with grapes give us tomato business.

4. On October 2, 1944, Crane sent a telegram to Rains as follows:

PFGP (referring to our night letter of 26th) quoting Futures Emperors—secured revised deal—fifteen cars U S One 2.50 net—same deal—CORSD (wire quick if wanted) any part.

5. On October 2, 1944, the following teletype messages passed between Rains and Crane:

Rains to Crane—Grapes—your wire just received—confirm Krotzki Farms Louisville 3 cars—airmail contracts for them to sign and will forward airmail check for 15 hundred—Mark Denunzio Sr. operated on today so wont be able to see his son Buyer before morn but am sure they will take 4 or 5 so reserve least 10 for us—understand title wont pass until Dec. 10 but some of them could be shipped Dec. 1 or 2 so arrive time for Xmas.

Crane to Rains—That last remark we not sure believe we can arrange something like that but it would have to be handled carefully and be sure we were not violating any O.P.A. ceilings—However quite sure so long as deal based at ceiling as of Dec. 10th that it could be done—Why 15 hundred deposit—the deposit was 1000.00 per car although maybe get by with 750 per car. Also all confirmation is based selling entire lot which is a cinch.

Rains to Crane—Your original wire positively specified 500.00 car deposit—look it up—will work like heck on entire lot but your wire the AM (morning) said all or any part.

Crane to Rains—We said all or any part subject confirmation reason we figured nobody want entire 15 but we sure can sell all of it—means however we will have to do that. Now our wire reads.

Rains to Crane—Your wire 26 rite (right) in front me said 500.00 deposit written out not code and

would be hard as heck to change it now—You surely could allot us say 10 cars and sell the other 5 if we cant place—

Crane to Rains—We could do that alright also notice original wire said 500.00 car deposit that was an error but still think can work it out that basis—can you sell the balance of 10 that way and how soon could you let us know.

Rains to Crane—Be sure give us an option till tomorrow noon—sooner if possible but dont think be able contact Bud Denunzio today as he is at hospital with his Daddy.

Crane to Rains—Well we will keep our finger on 3-4 extra besides above and will wire definite confirmation or refusal within couple of hours above three. What about tomatoes.

Rains to Crane—No tomatoes yet until frost on—well (we will) tell grower you made error about deposit might stretch it to 750. if absolutely necessary end.

Crane to Rains—OKay we will figure 750.00 probably OKay end.

6. On October 2, 1944, Crane sent a night letter to Rains as follows:

> Talked shipper Red Lyon Packing Company confirms Krotzki—necessary 750.00 car airmail deposits with signed confirmation Emperors—available now only two more cars possibly three same base CORDI DUNNE (answer first thing in the morning-depending on you) now all preference possible tomatoes as certainly been taking care you grapes.

7. On October 3rd the following teletype messages passed between Rains and Crane:

Rains to Crane—Grapes—Confirm Krotzki 2 cars instead of 3 Also confirm Denunzio 3 cars all U S One Emperors to be inspected when stored and airmail inspection slips—They will put up the 750.00 deposits—Now of course contingent upon receiving inspection reports when stored.

Crane to Rains—OKay—That confirms total 5 cars 2.50 F.O.B. acceptance final 750.00 car deposit plus 50.00 procurement charge—Thanks—will airmail confirmation two copies for Buyers signature. What about tomatoes—first car arrived Kansas City—just now got color report—about 20 percent color coming up nice—fine car—can you place around 3.90 delivered basis—85 U S One or better except same puff.

Rains to Crane—Have made every effort—Just no interest tomatoes yet—still hot as H. here and home grown killing demand until frost. Do you have 1 more Emperor if we can place.

Crane to Rains—Nope thats all—However will advise if locate further supplies. The end.

Rains to Crane—They are in new lugs 28 net EH.

Crane to Rains—That right End.

Rains to Crane—OK will airmail checks with signed confirmation when receive your copies—Thanks End.

The following telegrams passed between Rains and Crane after "Memorandum of Sale":

Rains to Crane (October 9, 1944)

Reference our sales memo 2011 error change AOOAE (3 cars) instead AOOAD (2 cars). Quote UNDED (U. S. No. 1 straight pack) (tomatoes) CADOP (rolling just out or immediate shipment).

Crane to Rains (October 9, 1944)

Correcting number 2011 also terms AFOHD (F. O. B. acceptance final) CORQC (if you do not wire immediately to the contrary we will understand this is satisfactory) Emperors. No USONE available ADLAR (offer subject to confirmation delivered) DSPHQ (due at San Antonio, Texas) 3.15 ALBIQ (approximately 85%) (AMORI (about ¼ colored) 4666 similar later 3.25 AJYUX (every indication will not see lower prices, look for rising market).

Crane to Rains (October 10, 1944)

Shipper Redlion takes view account ceiling lifted any contracts Emperors voided willing go along give your trade preference shipping as packed at market price which today 3.25 AFOHD (F.O.B. acceptance final) advise.

Rains to Crane (October 11, 1944)

Baloney Emperors confirmed 2.50 net no mention ceiling Denunzio Krotzki demand shipment or fight him to end stop quote tokays.

Crane to Rains (October 11, 1944)

Contacting grower to get definite stand CORIH (will wire again as soon as can give definite information) Emperors.

Crane to Rains (October 11, 1944)

Please call us collect 10 AM our time tomorrow Tucker 3839 regarding Emperor deal.

Crane to Rains (October 12, 1944)

As final gesture and endeavoring to amicable settle grape contract Redlion Packing Company will sell basis 3.00 net FOB quantities specified on con-

tract buyer to pay us .10 pkge procurement—Quality is nice uninspected field-run but Redlion states in all probability fruit easily grade U S One arrival but not willing make this guarantee. Out (our) inspector has seen fruit says really beautiful if buyers wish we will arrange to put cars storage which we have already under contract otherwise Redlion takes attitude that after all he had nothing to do with ceiling. Feels he relieved all moral responsibility by making this offer. Claims turning down offers his entire outfit today basis 3.40 cash FOB.

Rains to Crane (October 13, 1944)

Sorry Denunzio advises they not interested attitude any growers or what position they taking—their contract for purchase 3 cars Emperors 2.50 FOB net made with Associated Fruit Distributors. They insist and will use all means available for fullfillment of contract. For your information if grapes were now 2.00 you or Redlion would insist on fulfillment contract Krotzkis attitude same.

Crane to Rains (October 13, 1944)

Useless Denunzio Krotzki take attitude we principals—could not legally charge procurement in that event, furthermore wired you niteletter when confirmed "Shipper Redlion Packing Company confirms" Furthermore we acting as agents DUNOR (doing everything possible) get settled amicably however DUMTA (as a matter of fact) until you get confirmation straightened out correct terms FOB acceptance final not FOB there really no deal DUTIH (we working) doing best possible.

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a corporation,

Appellee.

APPELLEE CRANE'S BRIEF.

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APPELLEE CRANE'S BRIEF.

The transaction between the parties herein arose out of certain telegrams and teletype conversations. Therefore there can be no dispute as to the facts. There is, however, a great dispute as to the application of the law to the undisputed facts.

In Denunzio's brief he seeks to avoid the ruling of Judge Carter to the effect that the contract sued upon is illegal.

Before answering Denunzio's argument it seems fitting to declare the position taken by Crane with reference to the transaction between the parties. Crane took the position before the Department of Agriculture and before

Judge O'Connor that he was a buying broker and, therefore, agent for Denunzio and that he could not be held liable for failure of Kazanjian to ship the grapes in question. An examination of the petition of Crane setting forth the grounds upon which he relies to defeat the claim of Denunzio [Tr. pp. 12 *et seq.*] will disclose that Crane did not assert the illegality of contract before the Secretary of Agriculture, but defended upon the ground that he was the agent of the purchaser and not liable for the default of the seller.

This same position was taken before Judge O'Connor on appeal in a trial *de novo.* However, during the course of the trial in the District Court, Judge O'Connor announced that he would not accept the position taken by Crane that he was the agent of the buyer—but that the Court would find that Crane was the agent of Kazanjian, the seller of the merchandise. It was when Judge O'Connor took the position that Crane was the agent of the seller, and not before, that Crane then asserted the illegality of the contract, contending that if he was the agent for the seller, then the payment by Denunzio of the full ceiling price to the seller, Kazanjian, together with the payment of a commission to the agent for the seller resulted in the contract becoming void, being in violation of the Maximum Price Regulations issued pursuant to the Emergency Price Control Act of 1942. (U. S. C. A. Title 50 App.)

We fully realize that in asserting illegality of contract we are attacking a transaction in which Crane was the moving party. We feel that the interpretation to be put upon the facts of this case, as contended for by Crane, presented a valid contract and that the illegality arose

only when he was removed from the status of a buying broker and placed on the other side—that is as broker for the seller.

In this brief we will answer the various points presented by appellant Denunzio.

Answer to Point I.

Under this point Denunzio contends that the applicable maximum ceiling price is $2.53, not $2.50.

Denunzio in his brief states "Judge O'Connor in his Findings found the applicable maximum ceiling to be $2.53 per lug. [Finding II, Tr. p. 140.]"

This is not true. Judge O'Connor's finding in this regard was as to "The Contract" and he finds as to the contents of the September 26th telegram by Crane to Rains. The statement "The shipper to pay all storage charges, at a price of $2.53 per lug net to shipper, which was ceiling price at that time, * * *" is a statement taken from Crane's telegram of September 26th to Rains. [See Tr. p. 202 for the telegram.] Judge O'Connor did not make a Finding of Fact or Conclusion of Law to the effect that the ceiling was $2.53.

Denunzio next states: "Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug [Tr. p. 166]."

Judge Carter adopted, without change, the findings of fact made by Judge O'Connor, and at no place is there a finding as to what the ceiling price was. Judge Carter in his conclusions of law [Tr. p. 177, Par. IV] concludes that the "combined consideration amounting to approximately $2.54 per lug, exceeded the price ceiling of $2.50 per lug in effect at the time said sale was to take place,

said ceiling having been established by Maximum Price Regulation #426," etc.

The question as to what was the proper ceiling is a question of law and not one of fact. It involves the interpretation of MPR 426. Judge Carter took judicial notice of the ceiling price. For authorities sustaining this position see 44 U. S. C. A., Section 307, also case of *Miller v. Long-Bell Lumber Co.* (1949, Texas), 222 S. W. 2d page 244 and cases there cited.

Denunzio in his brief thereupon argues that if the ceiling price was $2.50 per lug, then the added procurement charge of $50.00 per car would, of necessity, make the total price over the legal ceiling and the illegality would be apparent on the face of the contract, but if the ceiling price was $2.53 per lug, then the contract price of $2.50 per lug plus the procurement charge of $50.00 per car, would not be illegal on its face, and it would be incumbent on the party contending such illegality to raise the question by an affirmative defense. This argument will be answered in reply to Point III where this point is argued by Denunzio.

Denunzio thereupon proceeds to point out that in the case at bar the ceiling price was $2.40 plus a 13¢ markup, making a total of $2.53. We do not believe MPR 426, Amendment 46 (Fed. Reg. 1944, pp. 9509-10-11) justifies this conclusion.

Amendment 46 to MPR 426, Table 2, deals with "Maximum prices for table grapes." Items 3 to 6, column 1, and the corresponding references to column 2, refer to table grapes produced in areas in California other than Riverside and Imperial Counties, with a net lug weight of 28 pounds or more. The grapes in question were produced in Tulare County, California.

Column 3 refers to sales by lugs and column 4 refers to seasons. Under the season from December 11th to the end of the season, by use of column 5, we find the maximum price to be $2.40. Denunzio concedes this much. (We respectfully request this Court to examine the tables shown on pages 9509-10-11 of the 1944 Federal Register to more easily determine the price ceilings.)

Denunzio falls in error in interpreting Table A found on page 9511 of the Federal Register.

The first set of figures, columns 1, 2 and 3 of this table refer to table grapes produced in Riverside and Imperial Counties of California and in Arizona, and the second set of figures refers to "all other areas" (Items 3 to 10, table 2) and refers to lug boxes containing net weight of 28 pounds or more. Column 4 establishes a markup which Kazanjian (a grower-packer) could make if sold "Through a broker in any quantity or through a commission merchant in carlots or trucklots." The markup is 3¢. Columns 5, 6 and 7 do not apply to the case at bar as they refer to sales in less than carlots.

Columns 8 to 12 of Table A refer to "Sales by any person (including grower-packers) through a grower's sales agent and sales by shipping point distributors."

If the sale in question is considered to be a direct sale made by Crane, as a shipping point distributor (both Judge O'Connor and Judge Carter found Crane to be "a broker or carlot distributor" [Tr. pp. 139 and 171], without the use of a broker or any other agent, then Crane's

ceiling price would be the $2.40 (base as shown by Table 2) plus a 10¢ markup, as shown by column 8 of Table A.

It will be remembered that Kazanjian was a grower-packer. [Judge O'Connor's Findings of Fact, Par. I, sub. 2, Tr. p. 140.] Judge Carter makes the same finding. [Tr. p. 172, Par. I, sub. 2.]

If the sale was made by Kazanjian "through a broker or salaried representative" then the markup would be 13¢ over and above the $2.40 base.

It must be conceded that upon the record Kazanjian was not paying Crane for making the sale, as Crane was looking to the buyer for his commission. Therefore the sale could not have been made by Kazanjian as a grower-packer through a broker to whom he was paying a commission, or a salaried representative, but the sale was made by Kazanjian as a direct sale without the use by him of a broker (that is—paid broker) or any other agent (that is—paid agent) and the markup was therefore 10¢ a lug under column 8 and not 13¢ under column 9.

The use of the words "salaried representative" in the heading shows that a sale under column 9 refers to one in which the grower-packer is put to some expense (salary of salaried representative) and it would appear that the word "broker" means a broker being paid by the grower-packer. The very purpose of granting the markup is to take care of selling expense. The heading at the top of Table A bears out this argument. It reads "Maximum Markups for *Distributive services performed by*

Growers-Packers, Shipping Point Distributors, *and their Agents, to be added to the Applicable Maximum price.* * * *" (Italics added.) The markup under column 9 would be to permit the Seller to recover his ceiling plus his selling expense. If, as here, there was no selling expense to Kazanjian for Crane's services, then there is no justification for the 13¢ markup.

It seems to us that the ceiling price of Kazanjian's sale should be governed by column 4 providing for a 3¢ markup or column 8 providing for a 10¢ markup.

MPR 426, Table 2, establishes a base ceiling from November 1 to December 10 as $2.10, and from December 11 to the end of the season as $2.40. Crane's telegram of September 26 [Tr. p. 202] states: "Shipper to Trans Title on or after December 10th." If the December 10th base ceiling applied it would be $2.10. If the December 11th base ceiling applied it would be $2.40. We have presented this analysis of MPR 426 predicated upon the assumption that the base ceiling of $2.40 applied. If the base price of $2.10 applied there would, of course, be a greater excess over the ceiling.

Denunzio is clearly in error in contended that the ceiling price was $2.53 instead of $2.50.

In view of these different markups, it was incumbent upon the trial court to first determine the status of each of the parties, and second to determine whether the sale was made as a direct sale by Kazanjian or a sale by Kazanjian through a paid broker or salaried representative.

Answer to Point II.

We have no dispute with the contention urged under this point to the effect that a contract is presumed to be lawful. This presumption stands until the contrary is shown.

Answer to Point III.

Under this point Denunzio contends that no illegality appears on the face of the contract and therefore it was incumbent upon respondent to allege and prove illegality.

Our answer to this contention is threefold, viz.:

(a) Invalidity was alleged.

(b) The case was tried on the theory that the contract in question was illegal.

(c) Whenever illegality appears it becomes the duty of the Court to refuse to entertain the action.

(a) Invalidity Was Alleged.

In paragraph 4 of complainant's amended complaint, it alleges the entering into the contract by Crane, acting as principal, or as agent for Kazanjian, or as both. [Tr. p. 18.]

In Crane's answer allegation 4 is denied. The answer continues: "This allegation is further denied for the reason that no valid contract was entered into" and after alleging certain steps with reference to the negotiations Crane alleges "it is denied that any valid, enforceable contract was consummated." Thereafter Crane alleged: "Pursuant to the denial of the existence of any valid, enforceable contract of sale, allegations 5, 6 and 7 are denied." These allegations deal with the parties negotiating the contract, the delivery of a standard memoran-

dum of sale and the contents thereof and the failure to ship. Crane further alleged: "Allegation 9 is denied in that no valid contract of sale was entered into for reasons previously outlined in this answer." [Tr. pp. 49-50.]

In the case of *Chadwick v. Chadwick,* 95 Cal. App. 690-9, 273 Pac. 86, the Court stated:

> "* * * an instrument may be invalid, simply because, in the interests of society, the legislature has prohibited the making or entering into the same."

Clearly these allegations were sufficient to put in issue the question of legality.

(b) The Case Was Tried on the Theory That the Contract in Question Was Illegal.

While the transcript of record does not show the evidence of illegality that was offered and the objections made thereto, still the fact that such a defense was litigated is shown by the memorandum opinion of Judge O'Connor.

In Judge O'Connor's memorandum decision we find the following heading: "Contention of Raymond M. Crane that the contract is *invalid:*" Under this heading Judge O'Connor states: "The said Raymond M. Crane however, contends that even assuming there was a meeting of the minds, or an offer and acceptance, the contract is unenforceable *inter alia,* for the reasons that (1) * * * (2) * * * (3) the provision for a $50.00 per car procurement charge to Raymond M. Crane, bringing the total cost of the grapes over the Maximum Price Regulation 426, issued by the Office of Price Administration, *vitiated the contract ab initio.*" [Tr. pp. 101-102.] (Italics added.)

Later in Judge O'Connor's opinion we find the following:

> "Raymond M. Crane, while he believed that the procurement charge of $50 a car was legal during the contract negotiations (note 10), took the position for the first time in this court that because he agreed to accept a procurement charge of $50 a car on each of the three cars of grapes sold, acceded to by A. B. Rains, Jr., in behalf of Joseph Denunzio, which concededly increased the cost thereof to Joseph Denunzio over Maximum Price Regulation 426, * * * the contract became illegal and void *ab initio;* and, therefore, unenforceable as against the public policy. Counsel for Joseph Denunzio contended the evidence was inadmissible before this court because the point had not been presented to and ruled upon by the trial examiner and the Secretary of Agriculture.
>
> In appellate proceedings evidence *aliunde* or *de hors* the records is usually inadmissible and counsel are confined to the record in the court below, but under the statute under which this case is being appealed, this is a trial *de novo* and therefore new evidence is admissible.
>
> *The court permitted both sides to file additional briefs on the illegality of contracts alleged to be contrary to public policy, and has considered the point raised, which is the most difficult one in the entire case.*" (Italics added.) [Tr. pp. 120-121.]

While Judge O'Connor stated that Crane, having been the prime mover in soliciting the brokerage in the first instance "does not stand before the court in very good grace," still it must be remembered that it was only when the trial court took the position that Crane was not a

buying broker or agent for the buyer but was the agent for the seller (Kazanjian) that Crane urged this contention. The question of illegality was discussed by Judge O'Connor in his opinion from page 120 in the transcript to page 129.

In Judge O'Connor's conclusions of law he concluded as follows:

> "7. The contract providing for the sale of grapes at $2.50 per lug is a legal and valid contract and is enforceable." [Tr. p. 150.]

There can be no question but what this case was defended upon the additional theory that the contract was illegal, and it is therefore too late for appellant to now contend that the illegality should have been alleged and proved.

In the case of *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, the Court laid down the rule as follows:

> "When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings and the court renders judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue."

This rule of law is sustained by the following additional cases:

> *Schroeder v. Mauzy,* 16 Cal. App. 443, 447 (118 Pac. 459);
>
> *Sprigg v. Barber,* 122 Cal. 573, 579 (55 Pac. 419);
>
> *Illinois T. & S. Bank v. Pacific Ry. Co.,* 115 Cal. 285, 297 (47 Pac. 60);
>
> *National Union Fire Ins. Co. v. Nason,* 21 Cal. App. 297, 299 (131 Pac. 755).

(c) Whenever Illegality Appears It Becomes the Duty of the Court to Refuse to Entertain the Action.

In the course of the trial, in response to the trial court's announcement that he would hold Crane to be the agent for Kazanjian, counsel for Crane urged the contention that if Crane was the agent of Kazanjian, then the payment to Kazanjian of the ceiling price and the payment to Crane, as agent of Kazanjian, of $50.00 a car made the contract illegal and unenforceable.

The rule in this regard is set forth in 6 Cal. Jur. 162, Sec. 112, as follows:

> "Where the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court *sua sponte* to refuse to entertain the action."

Substantially the same statement is found in the opinion of the Court in the case of *Dean v. McNerney,* 91 Cal. App. 206, 266 Pac. 975.

The foregoing rule is supported by the following cases:

Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673;
Morey v. Paladini, 187 Cal. 727, 203 Pac. 760.

Illegality appearing from the evidence, it was incumbent on the trial court to determine this issue.

(d) Cases Relied Upon by Appellant.

In the case of *Bernard v. Sloan,* 2 Cal. App. 737, 84 Pac. 232, defendant contended "that the only purpose and con-

sideration" for the contract was an agreement in restraint of trade and therefore the contract was illegal and void. This defense was not considered or sustained by the trial court and the appellate court refused to consider it.

The *Grimes v. Nicholson case,* 71 Cal. App. 2d 538, 162 P. 2d 934, was an action to recover for services performed and equipment used in carrying out a contract to install certain electrical equipment. Counsel contended that the contract, if entered into, was illegal because it was in violation of certain regulations of the Office of Price Administrator. The court held that appellant failed to prove facts showing the invalidity and that the burden of proof was on appellant. The case was tried on the theory that certain O.P.A. regulations applied. On appeal appellant conceded that they did not apply but asked the appellate court to consider other O.P.A. regulations as affecting the contract. The appellate court refused this request, stating:

> "The law is well settled in this state that 'an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal.' "

This case clearly has no bearing on the questions involved in this appeal.

The case of *Gelb v. Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, is one where plaintiff sought to recover a bonus which he claimed defendant agreed to pay him on the amount of business he did for defendant over a certain amount. The agreement was made some months before the O.P.A. regulations freezing salaries. This defense was

"raised for the first time on appeal and it was in no way pleaded or presented in the trial court." The Court stated:

> "The price control regulations relied on contain a number of exceptions, and no evidence having been received in this connection there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here."

The statement of the Court: "Under such circumstances, illegality is an affirmative defense that must be specially pleaded," is clearly dicta. The point was decided on the insufficiency of the record to show affirmatively that the O.P.A. regulations applied.

In the case at bar the issue of illegality was tried and determined by the trial court.

The case of *Bernstein v. Downs,* 112 Cal. 197, 44 Pac. 557(referred to by the Court in the *Gelb-Benjamin* case) is one wherein a question was presented as to whether the work contracted to be done could be legally performed. The Court stated:

> "The extra work contracted for was not within the enumeration of acts prohibited by the said section of the Penal Code; it was clearly not malicious; the facts show that the trustees permitted it; and, as the facts averred do not state an unlawful contract, its unlawfulness, if any, was a matter of defense."

The *Bernstein-Downs* case is of no help to appellant as the defense of illegality was tried by the trial court.

Answer to Point IV.

Under this point Denunzio contends that no evidence was introduced as to the illegality of the contract and he argues that no illegality is shown on the face of the contract, nor has an affirmative defense of illegality been raised by amended answer, nor by the evidence. Denunzio then states that the only evidence of the number of lug boxes in a carload of Emperor grapes is the evidence of the number of lugs that went into the three replacement cars, that one replacement car contained 1100 lugs and each of the other two replacement cars contained 1105 lugs. He then states that if the Court is willing to assume that the three cars to be supplied by Crane were each to contain 1100 lugs, this would make the commission to Crane amount to approximately 4½¢ a lug and he further states that he does not believe that the Court would be justified in making this assumption if the result would be to declare the whole contract null and void.

In the "Statement of Points on which Appellant Joseph Denunzio Fruit Company Intends to Rely" [Tr. p. 259, *et seq.*] there is no statement to the effect that Denunzio intends to raise the question of lack of evidence as to the number of lugs of Emperor grapes in a standard car as the basis of an attack on the holding of illegality.

In order to question the Conclusion of Judge Carter [Tr. p. 177] to the effect that the combined consideration amounting to approximately $2.54 per lug, exceeded the price ceiling of $2.50 per lug in effect at the time said sale was to take place, it was incumbent upon Denunzio to insert this contention in his statement of Points and request that all the material evidence on this question be printed in the Transcript of Record.

We realize that Rule 19, Subd. 6 of the Rules of this Court provides that "If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require." However, it is not our disposition to ask the Court to dismiss the appeal or to disregard the argument urged by Denunzio under Point IV. We choose to argue this point on its merits and therefore we have set forth in an appendix to this brief the evidence showing the number of lug boxes of Emperor grapes going to make up a standard car.

At the hearing of this matter we will ask the Court for an order permitting said appendix to stand as a part of the transcript of record. Assuming that the Court will grant this motion, we will argue this matter on the merits.

The evidence shows that a carload of grapes runs all the way from 775 boxes to 1170 boxes.

Crane testified that the standard car as he recalled it was 1106 lugs under O.D.T. ruling. [Appendix p. 1.]

Kazanjian testified that the minimum load was 889 or 890 to 899 boxes and the maximum load was 1170 boxes but that 1100 boxes was the standard car, that the range would be somewhere between 1000 and 1100. [Appendix p. 1.]

Other evidence was to the effect that the cars would contain 1105 boxes. Appendix p. 2.]

We feel that under the evidence the Court is justified in accepting the assumed figure used by Denunzio of 1100 lug boxes to a standard car of Emperor grapes in September to December, 1944.

If there were to be 775 lugs in the cars in question Crane's commission would be $.0645 a lug. If there were

to be 1170 lugs in the cars in question Crane's commission would be $.0427 a lug.

If the cars in question were to contain 1100 lugs Crane's commission would be $.0454 a lug.

These figures cover the commission on a range of lugs contained in a car (from the lowest to highest) as shown by the evidence set forth in the Appendix, and in every instance the commission would carry the sales price to a point in excess of the ceiling.

The total price being paid by Denunzio to Kazanjian and his agent Crane was, therefore, $2.50+.0454 or a total of $2.5454 per lug.

Denunzio further states that if Crane desired to prove that his commission would make the price paid exceed the ceiling "he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or * * * This he did not do." (Denunzio's Br. p. 17.)

We submit that we fully and fairly met the issue as to the number of lugs in a standard car and the price Denunzio agreed to pay per lug ($2.5454) and that our evidence showed illegality of the contract in question.

The question of "adjustable pricing" referred to on page 17 of Denunzio's brief and the lack of evidence to show this case does not come within one of the exceptions cannot help Denunzio. The trial court determined the contract was void. Every presumption is in favor of the propriety of the judgment of the trial court and it is incumbent upon Denunzio to assume the burden of showing (1) the contract came within one of the exceptions provided for in the Act, and (2) that the trial court erred. This he did not do.

Answer to Point V.

Under this point Denunzio contends that the contract in question could not exceed O.P.A. price regulations by more than six one-hundredths of one per cent.

In support of this argument Denunzio uses the figure 1100 as the number of lugs in the cars in question and the ceiling price as $2.53, and contends that the possible overcharge on the cars was only $17.00, which made a maximum possible overcharge of six one-hundredths per cent.

Using the car ceiling of $2.50 a lug and the figure of $.0454 a lug as Crane's commission, we find that the overcharge is 1.816% of the sale price of each lug. The commission of $50.00 a car exceeded the ceiling. The question as to the amount of overcharge is immaterial.

We are at a loss to know why Denunzio presents this question unless it is in support of the doctrine of *de minimis, non curat lex.*

In the case of *Porter v. Rushing,* 65 Fed. Supp. 759, the District Court dismissed the complaint in an action for damages and injunction where the excess rental charge was $1.00 a month. In reversing this ruling the Circuit Court stated:

> "* * * The courts are not vested with discretion either to deny enforcement or withhold the statutory remedies provided by Congress."

In view of the fact that the Emergency Price Control Act and Maximum Price Regulations were adopted to "stabilize prices" "in the interest of National defense and security" and for the "effective prosecution of the present war" (U. S. C. A. Sec. 901(a)), it is clear that the *de minimis* doctrine would not apply. It was a matter of public concern to keep prices down.

Answer to Point VI.

Under this point Denunzio contends that the Emergency Price Control Act sets forth the penalties for its violation and that such penalties do not include unenforceability of a contract in violation thereof.

It is the contention of respondent that the contract in question, being for the sale and purchase of grapes at a price in excess of the O.P.A. ceiling, is illegal and void.

The Emergency Price Control Act provides that it is in the interests of national defense and security and necessary to the effective prosecution of the present war, and that the purposes of said Act are to "stabilize prices" (Sec. 901(a)).

The Act empowers the Price Administrator to establish maximum prices (Sec. 902).

Section 904(a) provides:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any Act in violation of any regulation or order under Section 2 * * * or of any price schedule effective in accordance with the provisions of Section 206 * * * or of any regulation * * * or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 921(a) provides for the creation of the Office of Price Administrator and subdivision (d) provides: "The Administrator may, from time to time issue such regulations and orders as he may deem necessary or proper

in order to carry out the purposes and provisions of this Act."

Section 925(a) authorizes the Administrator to apply to the courts to enjoin violations of the Act and authorizes injunctions.

Subdivision (b) authorizes fines and imprisonment for violation of the Act.

Subdivision (c) confers jurisdiction upon the District Court in the criminal proceedings for violation of Section 4 of the Act and concurrent jurisdiction with all other proceedings.

Subdivision (d) precludes damages and penalties when persons act in good faith.

Subdivision (e) authorizes purchasers of commodities sold in violation of the regulations to bring actions against the seller on account of overcharge and authorizes recovery of three times the overcharge, and also authorizes the Administrator to sue where the purchaser does not sue.

Subdivision (f) confers certain powers on the Administrator.

Subdivision (g) authorizes the District Court to enjoin orders of the Administrator.

Maximum Price Regulation 426 (Fed. Reg. 1943, pp. 16409-11) contains the following provisions:

> "Sec. 7. Prohibition Against Sales Above Maximum Prices.
>
> On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver, and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this

regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum may be charged and paid.

* * * * * * * *

Sec. 9. Enforcement. Persons violating any provisions of this regulation are subject to criminal penalties, civil enforcement actions, suits for treble damages and proceedings for suspension of licenses provided for by the Emergency Price Control Act of 1942, as amended.

* * * * * * * *

Sec. 11. Evasion. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity, or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise."

It will be remembered that Denunzio had agreed to pay a total price of $2.5454 a lug, whereas the ceiling price established under Amendment 46 to MPR 426 was $2.50 a lug for the purchase of said grapes in a sale made by Kazanjian, as a grower-packer, or by Crane as an unpaid or unsalaried agent for Kazanjian or by Crane as a car-lot distributor (see answer to Point I).

The general rule with reference to illegal contracts and the effect of illegality is set forth in 12 Am. Jur. p. 652, *et seq.*, as follows:

"It is a general rule that an agreement which violates a provision of a Constitution or of a constitu-

tional statute or which cannot be performed without violation of such a provision is illegal and void. In this respect there is no distinction between statutes and ordinances. This is the general rule whether the consideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject." (Sec. 158.)

"So far as contracts in violation of statute are concerned, it may be said, speaking generally, that there is no distinction between acts *mala in se* and acts *mala prohibita.* Where a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition, to the morality or immorality of the act, or to the ignorance of the parties as to the prohibiting statute. It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing is prohibited because it is against good morals or because it is against the interest of the state. It is not necessary that a prohibited evil should be criminal in order to vitiate an agreement made in furtherance of that evil. According to some authorities, however, a distinction is made between acts which are *mala in se,* which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which are *mala prohibita,* which are void or voidable, according to the nature and effect of the act prohibited." (Sec. 159.)

"An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon.

When a contract, express or implied, is tainted with the vice of violation of law as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice. Moreover, where one of the parties thereto has performed in whole or in part, he cannot avoid the contract and recover reasonable compensation.

It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not, in express terms, declare the act unlawful, yet if it appears, from a consideration of the terms of the legislation in question that the legislative intent was to declare the act unlawful, an agreement involving the doing of such an act is illegal. * * *" (Sec. 160.)

In the case of *Morgan Ice Co. v. Barfield* (Tex. Ct. of Civil Appeals 1945), 190 S. W. 2d 847, plaintiff sought to recover damages for the failure of defendant to deliver ice pursuant to an agreement of sale. The sales price was in excess of the O.P.A. ceiling. On appeal the Court held that the contract in question "was in violation of and prohibited by the Federal statutes and directives of the Office of Price Administration and, therefore, illegal and void." In denying recovery the Court quoted from Section 904(a) of the Emergency Price Control Act and then stated:

"The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves. The courts will not permit a recovery to either side. (Cit-

ing cases.) Before appellee would be permitted to recover damages for the breach of a contract the duty rested upon them to establish a legal contract.

When the evidence shows the contract relied upon by a party is prohibited by law and therefore illegal, the courts are duty bound to dismiss such controversy, thereby denying relief to either party."

In the case of *Walker v. Jones* (Ala., 1947), 34 So. 2d 608, Jones sought to recover damages for sale of an auto in excess of O.P.A. ceiling. The syllabus contains the following with reference to instructions which were refused:

> "In action to recover damages for overceiling sale of automobile, charge that, if one of defendants received part of excess purchase price paid by plaintiff, other defendants would not be liable for such excess, was properly refused as not correctly stating the law."

So far as we have been able to ascertain the two cases above referred to are the only ones dealing with actions for damages by a purchaser for breach of a contract to sell merchandise in excess of an O.P.A. ceiling. There are many cases where other phases of contracts for the sale of merchandise in excess of O.P.A. ceiling have been considered by the courts.

In the following cases the United States Supreme Court approved the granting of an injunction to enjoin sales in violation of the Maximum Price Regulations:

United States v. Lutz, 142 F. 2d 985;

Case v. Bowles (1945), 327 U. S. 92, 90 L. Ed. 552.

In the case of *Hulbert and Bowles v. Twin Falls County* (1946), 327 U. S. 103, 90 L. Ed. 560, the Court held that a County could not enforce a contract to sell merchandise at a price in excess of O.P.A. ceiling, relying upon the case of *Case v. Bowles, supra,* as its authority.

In the case of *Walker v. Bailey* (Ala., 1947), 33 So. 2d 891, the Court considered an action to recover possession of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of O.P.A. ceiling. A subterfuge transaction had been worked out whereby part of the purchase price was paid to the plaintiff (a motor company which was selling the automobile for the owner), and the balance of the purchase price was paid to certain individuals who the Court found to be agents of the motor company. The Court stated:

> "In our opinion it is clear that under the provisions set out above that the mortgage and note which are the basis of this suit are illegal and void. The contract calling for the payment of a price above the O.P.A. ceiling is declared unlawful. A penalty is fixed for such actions. A prohibition must be implied under such conditions (citing cases). Contracts specially prohibited by law, or the enforcement of which violates the laws enacted for regulation and protection of private citizens are void and non-enforceable in the courts of this state (citing cases).
>
> Appellant's counsel contends strenuously that because of the recent United States Supreme Court decision in the case of *Bruce's Juices, Inc. v. American Can Company* * * * and in view of action for treble damages given the purchaser of over ceiling priced commodities under Section 925(c) that contracts violative of Emergency Price Control Act should be enforced in full and the victimized purchaser

> left to his remedy under Sec. 925(c) *supra.* The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act prohibiting such contracts. The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases).

The Supreme Court of Alabama denied a review of the foregoing case (33 So. p. 898).

In the cases of *Gales v. Wallace* (Ark., 1946), 194 S. W. 2d 881, *Scott Furniture Co. v. Maurer* (Ark., 1945), 187 S. W. 2d 185, and *El Paso Furniture Co. v. Gardner* (Texas), 182 S. W. 2d 818, plaintiffs sought to recover possession of personal property sold on a title retaining contract—the sale price being over O.P.A. ceiling. In each instance the purchaser had paid under the contract an amount equaling or in excess of ceiling. In each case the Court held plaintiffs were not entitled to any relief.

In the case of *Lewis v. Jackson* (Texas, 1947), 199 S. W. 2d 853, plaintiff sought to recover possession of an auto sold in excess of O.P.A. ceiling. Plaintiff had taken back a chattel mortgage for a part of the purchase price. The Court held the transaction to be void. The Court further held that by refusing to enforce such a contract it did not thereby add a penalty in addition to penalty prescribed by Act of recovery of three times the overcharge (syllabus).

In the case of *Blumenthal v. U. S.*, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, the Court sustained the conviction of four individuals on a charge of conspiracy to violate the Emergency Price Control Act and regulations thereunder by selling liquor at over-ceiling prices. In this case the purchaser paid the ceiling price for certain whiskey directly to the Francisco Distributing Company, as ostensible agent for the owner, and in addition thereto paid various intermediaries who were apparently working in conjunction with the Francisco Distributing Company. Regardless of the fact that the owner or his agent only received the ceiling price, the Court sustained the conviction of all the defendants for conspiracy to violate the O.P.A. ceiling.

In the case of *MacRae v. Heath*, 60 Cal. App. 64, 212 Pac. 228, the Court considered the question of validity of a contract for sale of frozen fruit. The law made it unlawful to sell frozen fruit. With reference to the right to recover for frozen fruit sold and delivered to the purchaser, the Court stated the rule as follows:

> "* * * The fruit, for the full contract price of which plaintiff had judgment, was all delivered later, when its condition was substantially known to all. Under such circumstances plaintiff cannot have the aid of the court to enforce his contract. The illegality of the sale consummated by his own act, delivery of the fruit, precludes a recovery by him of the contract price. The sale is void, not because it is contrary to public morals or founded on an immoral consideration, but because the statute expressly declares it so."

In the case of *Takeuchi v. Schmuck*, 206 Cal. 782, 276 Pac. 345, the plaintiff sought to recover certain money paid as a deposit on account of the purchase price of real prop-

erty. The Court denied any recovery on the ground that the attempted purchase was in violation of the Alien Land Law and illegal.

In the case of *Silverthorne v. Percey,* 120 Cal. App. 83, 71 P. 2d 746, plaintiff sought to recover a broker's commission for negotiating an exchange of real property. The agreement for the exchange of real property was illegal, as it was an attempt to sell a parcel of property by reference to an unrecorded map. The Court held that the plaintiff was not entitled to recover a commission for negotiating an illegal contract of sale.

In the case of *Kings, etc. v. Yucaipa, etc.,* 18 Cal. App. 2d 47, 62 P. 2d 1064, the Court held that the contract to store perishable commodities at a price less than the tariff filed with the Railroad Commission was illegal, the law expressly forbidding such contracts, and making them illegal and void. The Court denied any recovery for the warehouse charges, and denied recovery by the party storing the merchandise for claimed negligence in handling the merchandise in storage.

Clearly under the foregoing authorities the sale in question was a sale in direct violation of a ceiling price established under a valid regulation and was void.

Cases Relied Upon by Denunzio to Defeat Claim of Illegality.

In opposition to Crane's contention of illegality of contract—that no recovery can be had on an illegal contract—Denunzio relies upon three cases as sustaining the right of recovery on illegal contracts, one involving a sale in excess of price regulations and the other cases being in violation of the law.

The first case relied upon by Denunzio is the case of *Miller v. Long Bell Lumber Co.* (Texas, 1949), 222 S. W. 2d 244, which was an action on an open account to recover $12,906.17 for goods, wares and merchandise sold and delivered. Miller alleged in his answer that he was not liable for the account by reason of the fact that the Long Bell Lumber Co. had charged higher prices than permitted under the Emergency Price Control Act. The jury found that the reasonable value of the goods after allowing certain credits, was $12,906.17, the amount sued for. From this verdict the Judge deducted $790.69, which he found to be the total sum charged by Long Bell in excess of the O.P.A. ceiling on 61 items of the account. On appeal Miller contended that the case should be governed by the rule that "Courts will not lend their aid in support of illegal contracts." The Court conceded this to be a rule well recognized by the courts. The Court thereupon considered the *Morgan Ice-Barfield* case and the case of *Lewis v. Jackson* hereinbefore referred to and stated:

> "In the instant case the sale of the merchandise in question was not illegal in itself. The illegality of the transaction, if any, consisted in the fact that an overcharge was made on certain specified articles of merchandise. The penalty in such case as provided by the statutes relating thereto, which hereinafter will be discussed, in the event the overcharge was not intentional is merely a return of the amount of such overcharge."

The Court held the overcharge to be unintentional and that the general rule as to nonenforceability of illegal contracts is not applicable.

Clearly the *Miller* case is not in conflict with the rule contended for by Crane. Here we have a case where the

plaintiff is relying upon an illegal contract to recover damages. In the *Miller* case the plaintiff was seeking to recover the reasonable value of the merchandise sold and delivered to the defendant and the defendant sought to avoid payment for the merchandise he had received on the theory that some of the merchandise was billed to him at a price in excess of ceiling.

The next case relied upon by Denunzio is the case of *Macco Const. Co. v. Farr,* 137 F. 2d 52. This was an action for damages brought by Farr against the Macco Construction Co. for breach of an oral contract whereby Farr agreed to furnish automobile trucks and equipment and personal services for the entire duration of an excavation contract which Macco was carrying on. Without pleading illegality of the contract in question Macco, at the trial, sought to prove its illegality by showing that Farr was not entitled to recover because he had not obtained a permit from the Railroad Commission of the State of California, permitting transportation of property by trucks over public highways. Farr contended that the contract did not require the use of public highways and that the dirt was to be moved wholly on private property. The evidence showed that Macco was to, and did, hire the truck drivers and directed their work. After reviewing the evidence the Circuit Court stated:

> "It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum in se* * * *."

The Court held the contract to be valid and affirmed the judgment in favor of Farr on the theory that the contract did not contemplate an illegal object—that is the use of highways—in violation of the City Carrier's Act.

In the case of *Orlinoff v. Campbell,* 91 Cal. App. 2d 382, 205 P. 2d 67, appellant sought to have the Court apply the rule in the *Macco-Farr* case. In the *Orlinoff* case the contract contemplated the transportation of merchandise throughout Los Angeles County by the plaintiff, who did not have a permit to operate on the public highways under the Highway Carrier's Act. The Court held that the contract having as its object the transportation of merchandise over the public highways by a carrier who did not have a license, was a contract for an illegal object and the same was void and no recovery could be had thereunder. In refusing to apply the rule of the *Macco* case, the District Court stated as follows:

> "The principal holding in the case (Macco case), however, was that the operation of the contractors did not bring them within the scope of the act inasmuch as the work contracted for did not require the transportation of material on a public highway, and the minor use that was made of the highway in moving material was unsubstantial and purely incidental to the main operation. The language upon which plaintiff relies should not be given effect in circumstances differing essentially from those which the court had under consideration."

The next case cited by Denunzio is the case of *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219, which was an action to recover $114,000.00 upon certain promissory notes given for the purchase price of cans. Bruce alleged that the contract for the notes was illegal and that the notes were void, the alleged illegality consisting of the fact that the Can Company sold cans

to others at prices which discriminated against Bruce, thereby violating the Robinson-Patman Act. With reference to this defense of illegality, the Court stated that the Act did not prohibit all quantity discounts but expressly permitted same and that the Federal Trade Commission is the appropriate tribunal to hear and determine grievances growing out of quantity discounts and that until the Federal Trade Commission had determined the question that the courts were not given guidance as to what the public interest does require concerning same, and in denying Bruce's Juices the right to establish this defense, the Court stated:

> "Because of a more fundamental defect in petitioner's case, however, the Court does not find it necessary to consider the effect of these features of the Act on this case, as would be necessary before a conclusion could be reached that petitioner should win on the merits."

Clearly the *Bruce's Juices* case cannot be considered as an authority permitting recovery of damages for breach of an illegal contract. To apply the rule of illegality to the *Bruce's Juices* case would have had the effect of giving Bruce's Juices $114,000.00 worth of cans for nothing. Certainly the Court would not look with favor upon any such result.

Denunzio thereupon discussed cases involving the licensing statutes. The license statute cases are so far removed from the case at bar that we will not further discuss the matter.

Cases Involving the Sherman Anti-Trust Act.

We feel that the decisions under the Sherman Anti-Trust law furnish an analogy for allowing the defense of illegality under the Emergency Price Control Act.

The Sherman Anti-Trust law provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal" (July 2, 1890) 26 Stat. 209, Chap. 646; (Aug. 17, 1947) 50 Stat. 673-93, Chap. 690; 15 U. S. C. A. Sec. 1, 4 F. C. A. Title 15, Sec. 1.

The Sherman Anti-Trust law further provides for the recovery of treble damages, incurred by virtue of alleged violation of the Sherman Act, Sections 1 and 2 (July 2, 1890) 26 Stat. 209, Chap. 647m; (Oct. 15, 1914) 38 Stat. 730, 731, Chap. 323; 15 U. S. C. A. Secs. 1, 2, 7, 15, 4 F. C. A. Title 15, Secs. 1, 2, 7, 15.

In the case of *Sola Electric Company v. Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165, the Jefferson Electric Company sought to recover certain royalty payments due under a license agreement covering a patented article. The petitioner, Sola Electric Company, contended that the patent was invalid for want of novelty and that therefore the agreement for licensing was in violation of the Sherman Anti-Trust law. In denying recovery the Court stated as follows:

> "* * * petitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality, including proof of the invalidity of the patent."

In the case of *Continental Wall Paper Co. v. Louis Voight, etc.,* 212 U. S. 227, 53 L. Ed. 486, petitioner sought to recover for goods, wares and merchandise sold

and delivered. Defendant alleged that the plaintiff was the selling agent of a combination of wall paper manufacturers and that in carrying out such combination the defendants were compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell the same at lower prices or upon better terms than those upon which the plaintiff itself sells to dealers other than the jobbers. The defendant further alleged that the goods sued for were ordered pursuant to such agreement and at the prices fixed and that such prices were unreasonable and that the transactions between the parties were in furtherance of an illegal combination. In sustaining the defense the Supreme Court stated the rule as follows:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

See also case of *Bement & Sons v. National Harrow Company,* 186 U. S. 70, 46 L. Ed. 1058.

The rule laid down in the Sherman Anti-Trust cases is clearly to the effect that a contract which violates the Act is unlawful and no action can be predicated thereon.

Answer to Point VII.

Under this point Denunzio contends that a court may use its discretion in applying the Emergency Price Control statutory remedies and may use its discretion in applying a remedy not called for by the statute.

The matter of discretion arises only in the case of an injunction where the court may take into consideration the fact that the defendant did not intentionally violate the Act.

The cases relied upon by Denunzio do not support a rule that the court may use its discretion and hold an illegal contract to be a legal contract.

Answer to Point VIII.

Under this heading Denunzio contends that the contract is severable and that the illegal portion may be severed and the legal portion enforced. In support of this argument counsel contends that (1) the contract was to pay Crane, as agent for Kazanjian, for the grapes, and (2) a supplemental contract provided for the payment of a commission to Crane, and that the supplemental contract was dependent upon the primary contract being performed and that Crane did not earn his commission until the grapes were sold by Kazanjian to Denunzio.

This is an ingenious argument but weakness of same lies in the fact that the contract had but one object—the purchase by Denunzio of three cars of grapes.

We fully recognize the California Civil Code provisions on the question of the object of the contract and the severance of an illegal object from a legal object and the enforcement of the legal object. There are many adjudicated cases supporting this rule. It is our contention, how-

ever, that the contract in question does not present a contract supported by a valid consideration and providing for a legal object and an illegal object.

The contract in question, so far as Denunzio was concerned, was to buy three carloads of grapes, and so far as Crane was concerned was to sell three carloads of grapes. The purchase was the counter-part of the sale and had but one object—the transfer of three carloads of grapes from Kazanjian to Denunzio. The consideration for this transfer was the payment to Kazanjian of $2.50 a lug, which was the ceiling, and the payment of Crane (agent for Kazanjian) of $.0454 a lug as a commission. The illegality, as we view this case, is illegality of consideration, that is, Denunzio agreed to pay the seller and his agent more than the law permitted as the consideration for the delivery of the grapes. The Legislature of California clearly recognizes the difference between illegality of consideration and illegality of object.

Chapter IV of Title 1, of Part 2, of Division 3, of the Civil Code treats with the matter of "Object of a Contract." Under this subject we find the following:

Section 1595 provides that:

> "The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do."

Section 1596 provides that:

> "The object of a contract must be lawful when the contract is made, * * *."

Section 1598 provides that:

> "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, * * * the entire contract is void."

Section 1599 provides that:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

The contract in question had but one object—the purchase or sale of the grapes, dependent upon whether you refer to the buyer or seller. There is no other object disclosed by the contract.

The consideration for the purchase-sale of the grapes was the payment by Denunzio of more than the Maximum Price Regulations permitted. It is therefore a case of an illegal consideration.

Chapter V, Title 1, Part 2, Division 3, of the California Civil Code treats with the question of consideration for contracts and provides as follows:

Section 1605:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Section 1606:

> "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

Section 1608:

> "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

We do not find under the title "Consideration" for a contract any section dealing with severability of consideration similar to that found under the title "Object of a Contract" dealing with severability of object. In fact, the sections above quoted lay down a rule diametrically opposed to severability of consideration.

The case at bar, as we view it, comes clearly within the inhibition of Section 1608, that is, a part of the consideration for the sale or purchase of grapes was the payment to Crane of a sum of money that carries the total consideration paid to seller and his agent to an amount in excess of the ceiling.

An examination of the cases dealing with the severability of the legal object from the illegal object will show that the case at bar does not involve a contract with two objects—one legal and the other illegal—but a contract with one object where the consideration is illegal.

The position taken by Crane above is borne out by the decision of the Court in the case of *Poultry Producers Assn. v. Barlow,* 189 Cal. 278, 208 Pac. 93 (a case relied upon by Denunzio). This case involved the formation of a Poultry Producers Association by various poultry producers who entered into a subscription agreement having as its object the formation of the Association. A producer's sale agreement was entered between by the Association and the various members under which the members agreed to sell their eggs to the Association. One of the provisions of the subscription agreement was to give the

Association an option to repurchase its stock from the members. It was conceded that this repurchase provision was illegal. The Court, in this case, held that all of the considerations moving from the corporation to the shareholders were legal, but that one of the objects to be performed for these legal considerations was an illegal act. Even though there was an illegal act or object contemplated by the subscription agreement, the Court held that the produce sales agreement was valid and that the defendant was responsible in damages for failure to carry out this part of the agreement.

The *Poultry Producers* case clearly recognizes the necessity of a valid and legal consideration as the basis of the object of the contract.

The other case relied upon by Denunzio is the case of *Hedges v. Frink,* 174 Cal. 552, 163 Pac. 884. This was not an action for damages for breach of contract, a part of which was illegal, but an action on a promissory note, the giving of which was not involved in any particular in the illegal object. By reason of the apparent insolvency of a corporation an agreement was entered into whereby one of the creditors took over all the assets of the corporation except certain promissory notes and underwrote the obligations. It was agreed that the various promissory notes (including the one sued on) would be turned over to a trustee and the trustee could enforce the collection of the notes, and after the same had been collected the money so received would be distributed among the shareholders. The Court held that the provision of the contract for distribution of assets among the shareholders was illegal, but that the provision for the collection of the notes was legal because when the notes were collected the trustee would hold the money so received as trustee for the cor-

poration and that this object of the contract was perfectly valid.

In the case of *Endicott v. Rosenthal,* 216 Cal. 721, 16 P. 2d 673, the Court considered an action brought by plaintiff to recover a commission on the gross business done by defendants over a certain period. Under the contract in question defendants had hired plaintiff as a business counselor and advisor. Plaintiff had been instrumental in forming an association of dry cleaning plants (of which defendant was a member) under an agreement fixing prices. The association hired plaintiff, by a separate contract, as advisor to the association and the expenses incurred for the benefit of the association were to be paid out of the money paid by the members on their separate contracts. All members entered into separate contracts similar to the contract sued upon.

Defendant claimed the contract to be invalid as one in restraint of trade. Plaintiff contended that the illegal contract between the association members to fix prices could be severed from the contract sued upon. In ruling upon this point the Court said:

> "* * * The contract with the association and those with the individual members called for the same service to be performed by appellant. Among other things those services included price raising and eliminating competition. While portions of said contracts may be said to be legal, they are so interwoven with the illegal parts that they cannot be separated."

In the case of *Santa Clara Mill & Lumber Co. v. Hayes,* 76 Cal. 387, 18 Pac. 391, the plaintiff sought to recover damages for breach of contract. Both parties were engaged in the manufacture of lumber, and in the agreement in question Hayes agreed to sell the Lumber Company a

certain quantity of lumber during a given period and in addition thereto Hayes agreed not to manufacture lumber to be sold during said period in four counties in the State of California, except under contract to the Lumber Company and to pay the Lumber Company $20.00 per 1000 feet for any lumber manufactured and sold to parties other than the Lumber Company. The trial court found that the object of the contract in question was to form a combination to increase prices of lumber. The Lumber Company contended that the contract had two objects—the first being an agreement to sell lumber by Hayes to the Lumber Company, and the other purpose being not to sell lumber to persons other than the Lumber Company, and that the two objects could be separated and the agreement to sell enforced even though the agreement not to sell was unenforceable. With reference to this contention the Court stated that the object was a combination to increase prices and "This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement * * *."

In the case of *Prost v. More,* 40 Cal. 347, plaintiff sought to recover on three promissory notes. Defendant alleged that the notes were executed in accordance with an agreement whereby he bought certain tools and equipment and the seller agreed to abstain from the business it had theretofore conducted. The total consideration for the transaction was $2,000.00. The tools and equipment were not of great value according to the pleadings. The trial court granted judgment on the pleadings and on appeal

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respondent contended that the valid portions of the contract could be separated from the invalid portions. With reference to this contention, the Court stated:

> "* * * The contract is evidently an entire contract, and therefore, being void in part, is entirely void and cannot be enforced. (Citing cases.) The contract is not one in which the good can be separated from the bad, and the part which is good enforced. There are no different valuations fixed for the merchandise, the good will, or for the covenant not to engage in business in California."

In the case of *More v. Bonnet,* 40 Cal. 251, the plaintiff sought to enforce a promissory note which was part of the consideration for an agreement whereby it sold its business and agreed not to engage in the same business in the City and County of San Francisco, or the State of California. The plaintiff contended that even though the contract not to engage in the same business in the State of California was void, that the contract was severable and the one relating to the City and County of San Francisco was valid. The Court held that the contract was an entire contract and the valid portion could not be separated from the invalid portion.

While none of the cases above referred to may be considered to be on all fours with the case at bar, still the reasoning of the Court as disclosed by its opinions, shows the proper application of the rule that permits the severance of illegal object of a contract from the legal object and the enforcement of the legal object. The rule as disclosed by these cases is, that where the legal object of the contract is so dependent on the illegal object that the contract would not have been entered into had it not been for the illegal object, then there can be no severance of the legal

object from the illegal object and an enforcement of the legal object.

It must be borne in mind in analyzing these cases that they are actions to enforce the provisions of a contract. We submit that in any action for damages for breach of contract where one of the objects is illegal, there can be no severance because there can be no determination as to whether either of the parties depended upon the illegal object as one of the considerations for the legal object.

Conclusion.

In conclusion we submit that in view of the finding of the trial court to the effect that Crane was not a buying broker for Denunzio but was agent for the seller, the contract in question to pay the seller the ceiling price for grapes and to pay his agent a commission which brought the sale price to an amount in excess of ceiling, was illegal and could not be the basis of an action for damages for failure of the seller or his agent to deliver in accordance with the alleged contract.

Respectfully submitted,

Henry O. Wackerbarth,

Attorney for Appellee Raymond M. Crane, Doing Business as Associated Fruit Distributors of California.

APPENDIX.

RAYMOND M. CRANE

(called as a witness for respondent Crane) testified on direct examination by Henry O. Wackerbarth as follows [Rep. Tr. p. 14]:

"Q. Mr. Crane, do you know what the standard car of grapes, Emperor grapes, contained as to number of boxes, as of December 10th; also September and October 1944? A. Well, we had an O.D.T. ruling at that time. The increased load, as I recall it, was 1106 lugs.

Q. And that was a standard car? A. Yes." [Rep. Tr. p. 52, lines 9 to 15.]

JOHN C. KAZANJIAN,

respondent (called as a witness for respondent Crane), testified on direct examination by Henry O. Wackerbarth as follows [Rep. Tr. p. 83]:

"Q. As of October, December, and September 1944, was there such a thing as a number of lug boxes to a standard car of grapes? A. 890, to the best of my recollection; there were 899, I think, or 889 was the minimum load and the maximum load was about 1170.

Q. 1170. Was there any particular number as a standard car? A. Well, I would say about 1100 is the standard car.

Q. About 1100? A. I was packing 1040 that year. It depends on the type of loads you are making and the type of bracing material you are using." [Rep. Tr. p. 90, line 25, to p. 91, line 13.]

* * * * * * * * *

"The Court: Do you mean 1100 boxes in a car?

The Witness: I did not get you.

The Court: Do you mean 1100 boxes in a car?

The Witness: Yes, about 1105 is one load we make. We make another one of 1070. We make another one of 1040." [Rep. Tr. p. 92, lines 2 to 6.]

On cross-examination he testified as follows [Rep. Tr. p. 93, line 17]:

"Q. Then, you refer to the number of lugs in a car. Ordinarily in the trade, unless it is expressed otherwise, a standard car would be how many lugs?

*   *   *   *   *   *   *   *

A. I would say between 1,000 and 1100." [Rep. Tr. p. 94, lines 6, 7, 8 and 15.]

Mark Denunzio,

called as a witness for complainant [Rep. Tr. p. 100], stated with reference to car URTX purchased by complainant on October 30, 1944, as follows:

"Q. By Mr. Wackerbarth: And how many boxes in that car? A. This doesn't show here. The rest of the papers, that should be attached here. But it should be approximately 1100 or 1105." [Rep. Tr. p. 167, lines 13 to 17.]

John S. Arena,

called as a witness for complainant [Rep. Tr. p. 186], testified with reference to six cars of Emperor grapes which his company shipped between December 27, 1944 and January 19, 1945, that each of them contained 1105 boxes [Rep. Tr. p. 189, line 24, to p. 193, line 23].

A. B. Rains,

a witness for complainant, testified by deposition [Rep. Tr. p. 227] as follows:

"Q. In buying and selling grapes by the carload lot, how many lugs are considered a standard carload? How many lugs are in a minimum load? A. 1125 lugs are considered a standard carload. Approximately 775 lugs are in a minimum load.

Q. According to the custom and usage of the trade, when a contract calls for a carload of grapes, is it understood to mean a standard load unless otherwise designated? A. Yes." [Rep. Tr. p. 244, line 25, to p. 245, line 8.]

No. 12,662

IN THE

United States Court of Appeals

For the Ninth Circuit

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vs.	
RAYMOND M. CRANE, doing business as Associated Fruit Distributors, *Appellee and Cross-Appellant,*	
JOHN C. KAZANJIAN, doing business as Red Lion Packing Company (a corporation), *Appellee.*	

BRIEF OF APPELLEE JOHN C. KAZANJIAN.

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Attorneys for John C. Kazanjian, doing business as Red Lion Packing Company.

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BRIEF OF APPELLEE JOHN C. KAZANJIAN.

JURISDICTIONAL STATEMENT.

This action originated before the Secretary of Agriculture under the provisions of the Perishable Commodities Act of 1930 (7 U.S.C.A. 499).

John C. Kazanjian, doing business as Red Lion Packing Company, hereinafter referred to as "Kazanjian", and Raymond M. Crane, doing business as

Associated Fruit Distributors, hereinafter referred to as "Crane", each filed answers to the amended complaint of Joseph Denunzio Fruit Company, hereinafter referred to as "Denunzio". Thereafter, a formal hearing was had in Los Angeles, California, before an examiner appointed by the Secretary of Agriculture. At the close of the hearing the examiner granted a dismissal of the proceeding insofar as it affected Kazanjian (Tr. pp. 70-71). The Secretary of Agriculture then rendered a Reparation Order against Crane and dismissed the proceeding as to Kazanjian (Tr. p. 79).

Crane appealed to the United States District Court for the Southern District of California, Central Division, and on trial *de novo* before Judge J. F. T. O'Connor, the order of the Secretary of Agriculture, against Crane and dismissing as to Kazanjian, was affirmed by an opinion reported in 79 F. Supp. 117. Denunzio elected in writing to hold Crane liable and not Kazanjian (Tr. p. 138).

Crane made a motion for a new trial. Judge O'Connor died before the motion was presented and it was heard by Judge James M. Carter. Judge Carter granted the motion for a new trial but by an opinion reported in 89 F. Supp. 962 ruled that a new trial was unnecessary because the contract relied upon was invalid as violating the Emergency Price Control Act. He thereupon ordered the action dismissed as to both Crane and Kazanjian.

An appeal was filed by Denunzio and a cross-appeal was filed by Crane.

The Secretary of Agriculture is given jurisdiction to determine the matter presented to him by the provisions of 7 U.S.C.A., Sec. 499 (f) and (g). The jurisdiction of the United States District Court to hear and determine the appeal from the order of the Secretary of Agriculture is based on the provisions of law contained in 7 U.S.C.A., Sec. 499 (g). The United States Court of Appeals is given jurisdiction to review the judgment of the United States District Court under the provisions of law set forth in Section 128 of the Judicial Code, 28 U.S.C.A., Sec. 1291.

SUMMARY OF ARGUMENT.

I. Denunzio elected in writing in the lower Court, to hold Crane responsible and not to proceed against Kazanjian. On appeal it cannot change the theory of its case as against Kazanjian.

II. Kazanjian at no time entered into a contract to sell grapes to Denunzio upon which either party can be bound. There was no offer or acceptance or meetings of minds upon the terms of a contract.

III. The contract claimed by Denunzio, even if there were such a contract, was illegal and void because the sales price exceeded the ceiling price for the grapes under the Emergency Price Control Act then in effect.

ARGUMENT.

I.

DENUNZIO CANNOT ON APPEAL CHANGE THE THEORY OF ITS CASE AS AGAINST KAZANJIAN.

As will be apparent from a reading of the transcript and of the briefs of both appellants, it has been practically conceded by both at all times that the action should be dismissed as to Kazanjian. At no time did Denunzio indicate any theory or serious claim that Kazanjian was in any way liable to Denunzio. His brief makes no attack upon any of the orders dismissing the action as to Kazanjian i.e. the orders dismissing the action as to Kazanjian made by the examiner for the Secretary of Agriculture, by the Secretary of Agriculture and by the District Court of the United States, Southern District of California, in the trial *de novo* (79 F. Supp. 117), and upon the motion for a new trial (89 F. Supp. 962). Denunzio, at the trial *de novo* in the District Court, filed his written election to proceed against Crane and not Kazanjian (Tr. p. 138).

Insofar as Kazanjian is concerned, Denunzio must adhere on appeal to the theory upon which the case was tried in the Court below. Having elected not to proceed against Kazanjian he cannot now complain of the dismisal in favor of Kazanjian since it has been uniformly held that the theory upon which the case was tried in the lower Court should be the theory considered on the appeal.

> *Parrott Estate Co. v. McLaughlin,* 89 F. (2d) 188, 190;

Sacramento Suburban Fruit Lands Co. v. Melin, 36 F. (2d) 907, 909;

Gibson Properties Company v. City of Oakland, 12 Cal. (2d) 291, 299, 83 Pac. (2d) 942.

Crane, of course, is not seeking any relief against Kazanjian.

II.

KAZANJIAN AT NO TIME ENTERED INTO A CONTRACT TO SELL GRAPES TO DENUNZIO.

Kazanjian agrees with the contention of Crane that the evidence does not sustain either the Findings of Fact or Conclusions of Law that Crane acted on behalf of or as agent for Kazanjian. In the interest of brevity, no review of the evidence need be set forth in view of Crane's outline in his brief of the evidence showing that he was not acting on behalf of or as an agent for Kazanjian.

Any contract upon which Kazanjian can be held liable must arise out of two telegrams, being Crane's Exhibit "N" (Tr. pp. 217 and 218).

The first telegram from Crane to Kazanjian was an offer. It read:

"Western Union

Bq Losa Ly Ser Fruit Oct 3 1944
Red Lion Packing Co.
Exeter, Calif.

Referring telephone have sold for your account basis 2.50 lug net to you Block Emperors

mentioned five cars basis 750.00 car deposit ten cars basis 1000.00 deposit to be paid upon receipt USONE government inspections now depending you handle through us balance cars you mention for fresh shipment advise when expect ship these believe we could place them now ceiling pricdxxxprice with deposits selling basis ability make USONE grade suggest give us appropriate shipping dates mays well get cleaned up since ceiling precludes any possibility higher market time of shipment will forward confirmations for your signature soons receive airmail from buyers.

Associated Fruit Distributors
of California".

The second telegram from Kazanjian to Crane did not accept the latter's offer but made a new offer which was never accepted. Kazanjian's telegram read:

925A

S2BQ
SL58 77

Exeter Calif Oct 4 1944 11OP
Associated Fruit Distributors

Fifteen cars storage US One Emperors December tenth conversion satisfactory at two dollars and fifty cents fob Exeter guaranty by buyer. One thousand dollars deposit on 10 cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point. You to arrange for storage as agreed. Balance of pack intend to load after

Oct twentieth will be glad to make deal on said about the 15th of Oct.

John C Kazanjian

150pm
US fob 10 15 Kazanjian"

Because of the elemental rule that there must be an offer and an acceptance and a meeting of minds before there can be a contract, no contract can be found from these two telegrams. The two do not meet with the degree necessary to establish a contract.

Crane's wire provided for payment "upon receipt USONE government inspections", which could only mean receipt by buyers at their office in Kentucky. Kazanjian did not accept this but made a counter offer providing for payment "immediately on inspection at shipping point" i.e. Exeter, California.

Crane's offer included the term "now depending you handle through us balance cars you mentioned for fresh shipment * * *", while Kazanjian's counter offer definitely excluded this term from the deal by stating "Balance of pack intend to load after Oct twentieth will be glad to make deal on some about the 15th of Oct."

Kazanjian's wire required Crane "to arrange for storage". This was not mentioned in Crane's message.

Crane's message states "will forward confirmations for your signature soons receive airmail from buyers."

No confirmations were ever received and forwarded to Kazanjian (Tr. p. 220).

The two wires contain terms which clash rather than mesh and no contract can be found from them. Crane himself testified that no agreement with Kazanjian was ever reached (Tr. p. 224).

Kazanjian cannot be found liable to Denunzio unless he is a party to a binding contract. There is none here.

III.

THE CONTRACT, IF THERE WAS ONE, WAS ILLEGAL AND VOID BECAUSE THE SALES PRICE EXCEEDED CEILING PRICE UNDER EMERGENCY PRICE CONTROL ACT.

Judge Carter in his decision (89 F. Supp. 962) granting a new trial ruled that the contract was illegal and void as requiring a sales price in excess of the ceiling price provided in the Emergency Price Control Act of 1942, as amended.

An analysis of Judge Carter's decision and of Denunzio's brief attacking it sustains the decision of the Court below.

The contract, if there was one, called for a price of \$2.50 per lug, plus an added charge of \$50.00 per car to Crane, plus any charge paid to A. B. Rains, Jr., a broker in Louisville, Kentucky.

Denunzio, on page 12 of its brief, says:

> "Judge O'Connor in his Findings found the applicable maximum ceiling price to be \$2.53 per

lug (Finding of Fact II, Tr. p. 140). Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug (Tr. p. 166). If the ceiling price were $2.50 per lug, then an added procurement charge of $50.00 per car would of necessity make the total price over the legal ceiling. In such case, the illegality would be apparent on the face of the contract. On the other hand, if the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 per car would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a contract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the respondent Crane failed to do."

Whether the ceiling price was $2.50 or $2.53 per lug is immaterial. If we assume there were 1100 lugs to the car (while Denunzio on page 17 of its brief intimates there is no basis for the Court so assuming "if the result is to declare the whole contract null and void" its brief points out the very evidence from which the Court could so find. Incidentally, without the same finding from the same evidence there is no evidence upon which any of the tribunals below could assess the amount of damages awarded Denunzio against Crane), the $50.00 per car to Crane would equal $.0454+ per lug. This amount added to the $2.50 per lug gives a price of $2.5454+ per lug, or in excess

of the $2.53 per lug ceiling claimed by Denunzio, without consideration of any payments to Mr. Rains.

In view of the clarity of Judge Carter's decision it is not believed necessary to elaborate further upon this point.

CONCLUSION.

In conclusion, we submit that the decision of the tribunal below should be affirmed. Denunzio elected to proceed against Crane and not Kazanjian in the United States District Court and should not upon appeal be permitted to change the theory of its case. Kazanjian at no time entered into any contract with Denunzio upon which Kazanjian can be bound. The very contract upon which Denunzio relies would be illegal and void because the sales price of the grapes exceeded the ceiling price therefor under the Emergency Price Control Act of 1942, as amended.

Dated, Fresno, California,
January 2, 1951.

Respectfully submitted,
G. L. Aynesworth,
L. Nelson Hayhurst,
By L. Nelson Hayhurst,
Attorneys for John C. Kazanjian, doing business as Red Lion Packing Company.

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Joseph Denunzio Fruit Company, a corporation,

Appellant and Cross-Appellee,

vs.

Raymond M. Crane, doing business as Associated Fruit Distributers,

Appellee and Cross-Appellant,

John C. Kazanjian, doing business as Red Lion Packing Company, a corporation,

Appellee.

BRIEF OF APPELLEE JOSEPH DENUNZIO FRUIT COMPANY.

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Appellee.

BRIEF OF APPELLEE JOSEPH DENUNZIO FRUIT COMPANY.

Basis of Appellant Crane's Appeal.

As an appellant, Raymond M. Crane, doing business as Associated Fruit Distributors, hereinafter referred to as "Crane," takes the position that he was acting as buying agent or procuring broker for Joseph Denunzio Fruit Company, hereinafter referred to as "Denunzio," and that therefore he is not liable to Denunzio for Kazanjian's failure to deliver under the alleged contract. In other words, he takes the position that Denunzio acted through two agents—Rains and Crane—and that Kazanjian acted through none. Crane was not successful in this position either before the Department of Agriculture or in the court below.

Holding of the District Court on Appellant Crane's Contention.

Regarding this contention of Crane, Judge O'Connor made the following finding [Finding V, Sub. 4, Tr. p. 147]:

> "At no time material herein, was Crane the buying broker for Denunzio through Rains."

In his opinion, Judge O'Connor was even more specific on this point. He stated as follows:

> "The evidence is clear and convincing that during all the time these negotiations for the sale and purchase of grapes were in progress between Crane and Rains, Rains was acting exclusively as the buyer's agent for Joseph Denunzio, and did not know that Crane was acting for an undisclosed principal, John C. Kazanjian, until the time of the repudiation of the contract by the Red Lion Packing Company, as principal, on October 10, 1944, and by Crane on October 10, 1944, or at the earliest on October 3, 1944.
>
> "Furthermore, Crane and Rains, instead of functioning in a fiduciary relationship, *inter se,* were at all times dealing with each other at arm's length, each attempting to make the best deal possible for his client; and for Raymond M. Crane to now take the position that he was the buying agent or broker for Joseph Denunzio through A. B. Rains, Jr. during the foregoing negotiations leading up to the consummation of this contract, is fantastic and taxes the credulity of the court. There is no creditable evidence in this case to support such a contention." [Tr. p. 116.]

Wording of Original Telegram Shows Crane Was Agent of Seller.

It is the contention of Crane that the original night letter, dated September 26, 1944 [Tr. p. 70], shows that Crane was the buying broker or procuring broker rather than the broker for the seller. An examination of the wording of this night letter does not support this contention.

The night letter starts in by stating that Crane "can book Emperors." Crane argues that this verbiage shows an offer to act for a prospective purchaser. As pointed out by Judge O'Connor in his opinion, however, the word "book" used as a verb means to bind, to promise or to pledge oneself, or to make an engagement. And in *Barteldes Seed Co. v. Fox,* 134 Okla. 248, 273 Pac. 258 at page 260, a letter from plaintiff to defendant, reciting "we have booked your order for alfalfa and Sudan grass seed . . . and thank you very much for the same," was held to constitute an acceptance of the order. When Crane used the words "can book Emperors" he stated in effect that he could pledge himself to deliver Emperor grapes. Such language is not the language of a person seeking to put his services at the disposal of a buyer.

Furthermore, in this first night letter, Crane states that the price is "2.53 net to shipper which ceiling that time." The transaction was of such a nature that the applicable ceiling price was $2.53 per lug rather than $2.50 per lug. An examination of MPR 426, Amendment 46, which was the maximum price regulation in force at the time, shows that a ceiling of $2.53 per lug was the ceiling price when the seller was acting through a broker or carlot distributor. In other words, Crane considered himself the agent of the seller; otherwise, he would not have set forth

the ceiling price to have been $2.53 per lug—the ceiling price when the seller had an agent or broker.

A further examination of this original night letter of September 26, 1944, will show that Crane ended the portion of the telegram referring to Emperor grapes with the speedkode phrase "ADLAM" which means "offered subject to confirmation." The original telegram, then, sent by Crane after conferring with Kazanjian, used words definitely offering the grapes for sale.

Wording of All Telegrams Show Arm's Length Transaction Between Crane and Rains.

A reading of all of the telegrams passing between Rains and Crane shows an arm's length transaction in which Crane is endeavoring to sell both grapes and tomatoes to Rains and others. After Crane and Rains had finally completed the transaction for the Emperor grapes, Crane, in the same teletype, states: "What about tomatoes—first car arrived Kansas City—etc." Having made a sale in grapes, Crane was proceeding immediately to try and make a sale in tomatoes.

It will be noted that the language in the telegrams and teletypes exchanged between Rains and Crane is very different from the language in comparable correspondence between a principal and his agent. For example, Crane cites a case in 5 Agricultural Decisions 646 in which the broker was held to be the agent of the buyer and not the seller but the telegram from the broker to the buyer in that case reads as follows:

> "As per your telephone instructions I have purchased for your account small load due early morning A. M."

There can be no question that the above quotation is the language of agency, but it is quite different from the language used between Crane and Rains in the instant case.

Discussion of Cases Cited by Crane in His Opening Brief.

5 A. D. 646, cited by Crane has already been discussed in this brief.

Appellant Crane cites 6 Agricultural Decisions 928. The headnote of that case reads as follows:

> "Principal and Agent—failure to prove agency. Where complainant alleged in its complaint involving the alleged rejection of a shipment of lettuce, that one of two respondents acted in the transaction as agent of the other respondent, and this allegation is denied by both respondents who in turn aver that the agent acted solely as agent of the complainant who was to pay the brokerage, and the record contains a letter to the Department from the complainant which in effect confirms the contention of the respondents, it is concluded that complainant considered the said respondent as its agent and expected to pay the brokerage charges."

From the above, it is apparent that the determining evidence of who the broker represented was the letter of complainant admitting that the broker represented it. The person who employed the broker would then be liable for the brokerage in the absence of an agreement to the contrary.

In the case of *Adams & Dodge v. Joseph Martinelli & Co.*, 6 Agricultural Decisions 1018, there was only one agent D'Arrigo Bros. This case is not the same as the

instant one where Denunzio had his agent in Louisville and Kazanjian had his agent in California. In that case, the finding of fact simply was to the effect that the Martinelli Co. had authorized D'Arrigo to purchase the onions for it.

Crane quotes from the case of *W. H. Russum v. Schowker Bros.,* 6 Agricultural Decisions 583. The only relevant portion of the case is that quoted to the effect that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller. In the instant case, however, it will be noted that the offer came originally from the seller through the broker and the seller therefore made the broker his agent for the purpose of transmitting the offer. The original night letter was an offer at the price of $2.53 per lug. Later there was an offer at $2.50 per lug. Both of these originated with the seller, they were accepted by the buyer's agent Rains and then confirmed by the seller's agent Crane.

In *Barker-Miller Distributing Co. v. Berman,* 8 Fed. Supp. 60, there was an agreement between Robert Berman in Phoenix and the Barker-Miller Company of Phoenix that one Comer would purchase carloads of melons in Imperial Valley. Under this agreement, Comer, as the regular agent for the Barker-Miller Company, would send the bills of lading for the purchased melons to Phoenix where Berman would reimburse the Barker-Miller Company. In other words, here was a transaction in which Comer was the known agent of the Barker-Miller Company; Berman employed the Barker-Miller Company to make the purchases, and it in turn acted through its agent Comer. In the instant case, if Crane

had been the regular agent of Rains and Denunzio had dealt with Rains with the knowledge or agreement that Rains in turn would deal through his agent Crane, we would have a situation parallel to the *Barker-Miller* case. But in the instant case, Denunzio had not authorized Rains to employ Crane as an agent and neither Denunzio or Rains intended that Crane act as its, his or their agent.

A Broker Is the Agent of the Party First Employing Him.

The proper test to determine whether a broker is the agent of the seller or the buyer is to determine who first employed the agent. The person who pays the broker is not necessarily the principal of the broker; by contract the parties may provide that either the purchaser or the seller pay the broker, irrespective of which party the broker represents.

A good general statement of the law on this point is set forth in 12 C. J. S. at page 36, as follows:

> "Primarily a broker employed in a particular transaction is the agent of the party who first employs him." (Citing *Stephens v. Ahrens,* 179 Cal. 743, 178 Pac. 863, and *Carothers v. Caine,* 38 Cal. App. 71, 175 Pac. 478.)

In 12 C. J. S. at page 179, the law is further set forth as follows:

> "The adverse party may be liable for the brokerage if liability is imposed upon him by contract." (Citing *Hutchon v. Rose,* 130 Cal. App. 735, 20 P. 2d 357, and *Calhoun v. Downs,* 211 Cal. 766, 297 Pac. 548.)

In *Calhoun v. Downs (supra),* the defendant Downs desired to sell certain real property and, according to the allegations of the complaint, employed the plaintiff Calhoun as a broker to sell the property. The plaintiff procured the defendant Ahlborn to purchase the property and an agreement to purchase and sell was entered into. Subsequently, the defendant Ahlborn entered into an agreement with the defendant Downs whereby the property was to be sold to him without any provision being made for payment of commission to the plaintiff broker but the defendant Ahlborn agreed to pay any commission that might be payable out of the transaction. The demurrer of the defendants to the complaint was sustained, but on appeal this was reversed. In particular, the court held that the defendant Ahlborn was liable for the payment of this brokerage because of his specific contractual obligation to pay and this even though there was no contention but what the plaintiff was the broker for the seller rather than for the purchaser the defendant Ahlborn. The court, at page 770, states:

> "Furthermore, in the second agreement, being the agreement of date June 1, 1926, as we have seen, Ahlborn agreed to pay any commission which might be claimed by any person 'because of the sale of the herein described property.' It is true that this agreement was not made with the plaintiff. It cannot be said, however, that it was not made for his benefit. If made for his benefit, although he was not a party to the agreement, he may recover thereon."

In the instant case, we do not have to go as far as in the case of *Calhoun v. Downs.* In the instant case, the agreement to pay the brokerage was actually made with the broker Crane. When such a specific contractual agreement is entered into, then Denunzio would be liable for the commission, if the broker performed, even though the broker was the agent of the seller Kazanjian.

In summary then, the broker is not the agent of the person who agrees to pay him his commission, as either party by written agreement can assume this obligation, but he is the agent of the party who first employs him. In the instant case, the findings are crystal clear that the seller, Kazanjian, was the person who first employed the broker Crane. The Secretary of Agriculture found that Crane was first contacted by Kazanjian who "on or about September 26, 1944, advised (Crane) that he had some grapes to offer for sale." [Tr. p. 70.] The Secretary thereupon goes on to find that "thereafter this witness (Crane) carried on teletype and telegraphic correspondence with Mr. Rains." [Tr. p. 70.]

The court in its findings [II, Subsec. 1, Tr. p. 172] found that "Crane, without prior solicitation from Rains, sent Rains (and others) a telegraphic offer on September 26, 1944, offering to book nine cars of Emperor grapes U. S. #1. . . ."

All findings have been unvarying that it was Kazanjian who originally communicated with Crane regarding the sale of these grapes and that thereafter Crane com-

municated with other brokers, including Rains, offering these grapes for sale. Under these circumstances, it appears clear that Crane was the broker for Kazanjian, although by contract he specified that his commission be paid by the other party. This he was able to do because it was a seller's rather than a buyer's market.

Respectfully submitted,

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No. 12662

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Appellant and Cross-Appellee,

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Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Appellee.

CROSS-APPELLANT CRANE'S REPLY BRIEF.

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CROSS-APPELLANT CRANE'S REPLY BRIEF.

In the brief of cross-appellee Denunzio he contends (1) the evidence shows Crane was agent of seller and (2) that a broker is the agent of the party first employing him. These contentions are predicated upon an unreasonable interpretation of the evidence.

Crane Was Not Agent of Seller.

Denunzio contends that the use of the word "book" in the September 26th telegram shows an intention "to make an engagement" to sell the grapes and he relies upon the *Bartles v. Fox* case for support.

The *Bartles-Fox* case was one where the buyer ordered seed and the seller replied "we have booked your order

for * * * seed." The Court held that the seller's letter was an acceptance of the order and the order and acceptance constituted a binding contract. The facts in the case at bar are entirely different from those presented in the *Bartles-Fox* case.

Certainly the question as to whether or not Crane was agent for the buyer or seller cannot be determined from the use of the word "book" without considering the other portions of said telegram and the other telegrams passing between Crane and Rains and the teletype conversations occurring between the passing of the telegrams. We should, therefore, look to all the evidence to determine whether Crane was making an offer to sell as the principal or as agent for someone else as principal. Crane was aware that, at that time, there was a seller's market and those having grapes had no difficulty in selling same, that the only problem presented was selecting to whom they would sell. Crane was also aware that under these circumstances no grower or packer of grapes would employ a broker to sell same and pay him a commission.

Crane being in the brokerage business proceeded to transfer grapes from the packing house to the ultimate consumer in a way that he could procure a commission for his services [Tr. pp. 221-2]. The way adopted by Crane, as we view the evidence, was to offer to perform services for a buyer in procuring grapes, providing the buyer would pay him a procuring brokerage or procuring charge for his services.

In the case at bar the documentary evidence discloses (1) a buyer—Denunzio, (2) a seller—Kazanjian, (3) a procuring broker—Crane, and (4) an intermediate broker —Rains. At no time did Crane represent himself as seller or agent for seller. Crane's September 26th tele-

gram clearly discloses two different parties—a seller and a procuring broker. The relevant parts of the telegrams are as follows: "Can book Emperors * * * we to personally inspect AFOHD (F.O.B. Acceptance Final) Basis our Inspection Shipper to Trans Title on or after December 10th He paying all storage charges * * * Price 2.53 net to shipper which ceiling that time We charging 50.00 Procurement charge * * *" [Tr. p. 202].

In the September 28th teletype conversation between Rains and Crane, Rains proposed a deal different than the September 26th telegram and Crane replied "We will have to put that up to the shipper * * *" [Tr. p. 227].

On October 2nd Crane wired Rains that he had secured a revised deal on the Emperors at 2.50 net [Tr. p. 205]. In a teletype conversation on October 2nd Rains approved a sale of 3 cars to another merchant he represented [Tr. p. 230] and on the same day Crane telegraphed Rains: "Talked Shipper Red Lyon Packing Company Confirms Krotzki * * * Emperors available now only two more cars possibly three same base" [Tr. p. 206]. (Krotzki was the other merchant represented by Rains.)

There can be no misunderstanding from these telegrams and teletypes as to Crane's position. The constant reference to the seller as "shipper" and reference to "we" as the procuring broker in the telegrams and teletypes, coupled with the oral evidence as to the custom of the trade to the effect that a buying or procuring broker is the agent of the buyer [Tr. pp. 215-6], shows Kazanjian (Red Lion Packing Co.) to be the seller and Crane to be the agent of the buyer.

The fact that in the September 26th telegram Crane was to inspect the grapes and buyer was to accept same

on the strength of Crane's inspection would show Crane was buyer's agent. Certainly a buyer would not ask the seller or the seller's agent to inspect the grapes for the buyer and agree to be bound by the seller's inspection or inspection by seller's agent.

Denunzio further states that the maximum price ceiling was 2.53 when seller was acting through a broker or car lot distributor and that Crane considered himself agent of the seller, otherwise he would not have set forth the ceiling price in his quotation.

In answer to this we state: first, the ceiling price was 2.50 not 2.53 (see Appellee Crane's Brief, pp. 3 to 7, incl.); and secondly, that the telegram of October 2nd [Tr. p. 205] correctly sets forth the ceiling at 2.50; and thirdly, that if Denunzio agreed to pay ceiling price to the seller and to pay the seller's agent a commission in addition thereto he was, and should have known he was, violating the price ceiling (see Argument, Appellee Crane's Brief) and that such a contract was void.

As we view these facts, Crane was trying to earn a commission. He knew that the seller was demanding the full ceiling price and that he (Crane) had to get his commission from the buyer, and therefore he offered to procure (book) grapes for the buyer, providing buyer would pay him a commission called "procurement charge." He was, therefore, the agent of the buyer.

The use of the code word "ADLAM" meaning "offered subject to confirmation" would refer to a confirmation by the seller. Rains clearly recognized the seller was to confirm, for in his teletype conversation of October 2nd [Tr. p. 230] he calls for a confirmation, and in Crane's

telegram in reply thereto he states: "Red Lyon * * * confirms."

Crane, as agent of buyer, was ordering the grapes and the seller confirmed. There was no request for a confirmation by buyer or by Crane.

Crane Was Not First Employed by Kazanjian.

Denunzio advances the argument that Kazanjian first employed Crane, therefore Crane was Kazanjian's agent, even though Denunzio was to pay for Crane's services. Denunzio thereupon seeks to prove Kazanjian first employed Crane by quoting from the Findings of the Secretary of Agriculture and Judge O'Connor (Brief of Appellee Joseph Denunzio Fruit Co., p. 9). The quoted Findings do not constitute a finding of employment of Crane by Kazanjian first, or at any time.

The evidence showed that Kazanjian did not and would not employ Crane or any other broker to sell grapes during the 1944 season [see Crane's evidence, Tr. pp. 198 to 200 incl.] and that where a broker sends out form telegrams to numerous other brokers calling for the payment to the sending broker of a "procurement charge" the understanding was that the brokers receiving the telegrams would notify their buyers that such buyers could procure grapes through the sender of the telegrams providing the buyer was willing to pay the broker sending the telegrams a procuring or buying charge [Tr. p. 215].

This evidence does not disclose the "first employment" or any employment of Crane by Kazanjian.

The evidence not supporting the hypothesis upon which this argument is based, it is unnecessary for us to discuss the cases supporting such argument.

Conclusion.

In the event this Court should not agree with Judge Carter's reasons for granting a dismissal of this action, then this Court should consider the contentions of appellant in this cross-appeal and affirm the decision of Judge Carter.

Respectfully submitted,

Henry O. Wackerbarth,

Attorney for Cross-Appellant Raymond M. Crane, doing business as Associated Fruit Distributors of California.

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a corporation,

Appellee.

PETITION FOR REHEARING.

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IN THE

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FOR THE NINTH CIRCUIT

Joseph Denunzio Fruit Company, a corporation,
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Appellee and Cross-Appellant,

John C. Kazanjian, doing business as Red Lion Packing Company, a corporation,
Appellee.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals, for the Ninth Circuit:

Raymond M. Crane, doing business as Associated Fruit Distributors of California, appellee and cross-appellant herein, hereby petitions for a rehearing of the above entitled matter after decision of this Court reversing the judgment of Judge James M. Carter, entered upon granting of a motion for a new trial interposed by said appellee.

The grounds upon which this petition is based are:

1. This Court erred in its application of the law to the facts of this case.

2. To consider the issues involved in the light of recent decisions of courts of last resort holding contracts entered into in violation of O. P. A. Regulations to be void and unenforceable.

3. The payment of a commission by Denunzio to Crane (Kazanjian's agent) was the same as paying the sale price and commission to Kazanjian.

4. To further consider the equities of this case.

Ever since the contention was advanced by appellant Denunzio before Judge O'Connor that Crane was the agent of appellee Kazanjian, we have steadfastly contended that the so-called agreement to pay a seller of merchandise and his agent a sum of money in excess of the ceiling established by O. P. A. under the Emergency Price Control Act was unlawful and void and could not be the basis of an action for damages for a breach of the so-called agreement against the seller or his agent. We use the words "so-called agreement" advisedly because it has always been our contention that the negotiations never resulted in an agreement. That question became immaterial because of Judge Carter's holding the agreement relied upon by appellant to be illegal.

This Court's Decision in the Case at Bar.

In its opinion this Court reviews the proceedings before Judge O'Connor and Judge Carter and thereupon sets forth the conclusions of Judge Carter and the contentions of appellant as to error on the part of Judge Carter. This Court thereupon states: "The primary question presented

by this appeal has to do with the legality of the contract." and with reference thereto stated: "Upon this record we are satisfied that Judge O'Connor's findings of fact are supported by substantial evidence, and that his conclusions of law are supported by his findings of fact".

Nowhere in this Court's opinion has it set forth any reference to the provisions of the Emergency Price Control Act or the regulations adopted by the Office of Price Administration, nor has this Court referred to or quoted from any legal authorities or adjudicated cases as supporting the legality of the contract sued upon. We are at a loss to know just what provisions of the Emergency Price Control Act or regulations of the Office of Price Administration or decisions of courts of last resort this Court relies upon as a basis of sustaining the legality of the contract in question. We therefore feel that in this petition for rehearing it becomes necessary to briefly review the provisions of the Emergency Price Control Act and the regulations of the Office of Price Administration and refer to the authorities relied upon by both Denunzio and Crane.

The Contract Relied Upon by Denunzio.

The contract relied upon by Denunzio was for the sale of three carloads of grapes at a price of $2.50 per lug, plus a commission of $50.00 a car to Crane.

The evidence showed that a carload of grapes contains from 775 boxes to 1170 boxes, with an average of 1100 boxes. This would make the per box commission to Crane run from $.0645 a lug for a car containing 775 lugs to $.0427 a lug for a car containing 1170 lugs. The average of 1100 lugs per car would make a per lug com-

mission of $.0454. (See appellee Crane's brief, p. 15, *et seq.* and appendix.)

Judge Carter found the combined consideration to amount to approximately $2.54 per lug.

The O. P. A. Ceiling.

Crane contends that the ceiling at the time delivery was to be made was $2.50 a box to the seller. (See Appellee Crane's Br. p. 3.)

Denunzio contends the ceiling at said time was $2.53. (See Appellant Denunzio's Br. p. 12.)

The ceiling contended for by Denunzio was still below the price Denunzio was to pay to the seller and his agent.

Provisions of the Emergency Price Control Act and Office of Price Administration Regulations.

The pertinent provisions of the Act and Regulations are set forth in Apellee Crane's brief commencing on page 19. Briefly they are as follows:

It is in the interests of national defense and security and necesary to the effective prosecution of the present war to "stabilize prices". (Sec. 901(a).)

The Administrator is empowered to establish maximum prices. (Sec. 902.)

It is "unlawful to buy or receive a commodity or do any act in violation of any regulation or order or price schedule or to offer to do so. (Sec. 904(a).)

Creates the Office of Price Administrator and authorizes him to issue Regulations and Orders. (Sec. 921(a)(d).)

Authorizes Administrator to apply to the courts to enjoin violations and authorizes injunctions, fines, imprisonment and confers criminal and civil jurisdiction on the District Court. (Sec. 925(a)(b)(c).)

Precludes damages and penalties when persons act in good faith. (Sec. 925(d).)

Authorizes purchasers to bring actions against sellers for overcharges and treble damages and authorizes Administrator to sue. (Sec. 925(e).)

The pertinent provisions of Maximum Price Regulation 426 are:

No person shall sell or deliver or buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this regulation or agree, offer or attempt to do any of these acts. (Sec. 7.)

Persons violating these regulations are subject to criminal penalties, civil enforcement action and suits for treble damages. (Sec. 9.)

Price limitations shall not be evaded by direct or indirect methods or by way of commissions or any other charge. (Sec. 11.)

It will thus be seen that a contract in violation of the Act and Regulations is "unlawful" and the Seller is subject to criminal penalties, injunction, repayment of overcharge or treble damages.

The Effect of This Court's Decision.

The effect of this Court's decision is that a seller must go through with an "unlawful" contract and subject himself to criminal penalties, injunction, repayment of overcharges or treble damages, or in the event he still refuses to go through with the contract then to pay the buyer all profits or damages which the buyer would have made out of this "unlawful" contract. Certainly Congress never intended such to be the interpretation of the Acts and Regulations above summarized.

That such is not the rule is shown by the statement of the Court of Appeals of Alabama, 33 So. 2d 891, as follows:

> "The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act of prohibiting such contracts." (*Walker v. Bailey.*)

The Case at Bar.

This is not an action to recover the contract price or reasonable value of merchandise sold and delivered at a price in excess of O. P. A. ceiling. It is an *action for damages* for breach of an alleged contract to sell merchandise at a price in excess of O. P. A. ceiling. The merchandise was never delivered. The contract price was never paid. The terms of the contract were never definitely agreed upon. The deposits which Denunzio was to make were never made.

The appellant is asserting an unlawful contract as the basis of his claimed right to recover damages and not to

recover for merchandise delivered and which Crane is keeping but refusing to pay for.

All equities should be *in favor* of a seller who has delivered merchandise to a purchaser, where the buyer retains the merchandise and refuses to pay for same, claiming the contract to be void because the contract price is in excess of ceiling.

All equities should be *against* a buyer who claims damages because the seller refuses to carry out an unlawful contract.

The Authorities Relied Upon by Appellant Denunzio.

All of the cases relied upon by Denunzio are where the defendant had received a valuable consideration and seeks to avoid paying for same while still keeping the consideration.

Most of the cases cited by Denunzio as supporting his contention were analyzed in appellee Crane's brief commencing on page 28 and it was pointed out that none of said cases (other than *Miller v. Long Bell*) involved an O. P. A. violation and none of the cases authorized a recovery of damages for breach of an unlawful contract.

The case of *Miller v. Long Bell Lumber Co.* was an action to recover the reasonable value of merchandise sold and delivered and the Court deducted from the price charged the excess over the O. P. A. ceiling. The Court found the overcharge to be unintentional and governed by a provision of the Act which provides for a return of the overcharge under such circumstances. This case does not support the claim that damages can be recovered because defendant refused to do a prohibited act.

The case of *Bruce's Juices v. American Can Co.* relied upon by Denunzio cannot help him as this was an action to recover the purchase price of cans which defendant contended were billed in violation of the Robinson Patman Act. The Court allowed recovery for the cans received and retained by defendant.

In speaking of the case of *Bruce's Juices* case the U. S. Court of Appeals, 2nd Circuit, stated (*Vines v. General Outdoor Advertising Co.,* 171 F. 2d 487) that case "held that the buyer of goods from a seller, who is engaged in violating such a statute, may not keep the goods without paying the price. The theory was that the seller's unlawful enterprise did not forfeit his title to the goods and that, since the buyer got his own title from the seller, he was obliged to conform to the conditions imposed upon its transfer."

In the case of *Turner Glass Corp. v. Hartford Empire Co.,* U. S. Ct. of Appeals, 7th Circuit, 173 F. 2d 49, the Court cited the *Bruce's Juices* case as supporting "the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust violations * * * But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit * * *".

Clearly the *Bruce's Juices* case does not support the contention that damages may be recovered for refusal of defendant to carry out an unlawful contract.

I.

The Court Erred in Its Application of the Law to the Facts of This Case.

The Emergency Price Control Act makes it "unlawful" to violate price schedules or regulations.

The effect of entering into an "unlawful" agreement is to make the same void and unenforceable. The agreement being void it cannot be enforced in an action on the agreement and the reverse of this is also true—it cannot be the basis of a suit for damages where one party refuses to go through with the agreement.

Numerous cases are set forth in appellee Crane's brief (pages 19 to 28) holding "unlawful" contracts to be void and unenforceable and that no action can be brought thereon to enforce the contract or to award damages for the breach thereof and more cases are cited under Sub. II hereof.

This Court erred in its application of the law to the facts of this case.

II.

Recent Cases Involving O. P. A. Ceiling.

In the case of *Hall v. Bucher* (decided Feb. 1950, Mo.) 227 S. W. 2d 96, plaintiff sought to recover money claimed to be due for corn delivered. It was agreed that the price of the corn should be the highest ceiling price during a certain period. At the date of the sale the ceiling price was $1.08 a bushel and the purchaser paid this amount. During the period referred to in the contract the ceiling price rose to $1.33⅓ a bushel. This action was to recover the difference. Defendant contended that the provision of the contract for adjusting the price upward

was in violation of O. P. A. regulations. The Court held the contract for price adjustment to be void and denied recovery. The plaintiff contended that defendant induced him to enter into the contract and that therefore he could not plead illegality, but the Court rejected this contention stating "the law permits a party to an illegal agreement to set up the illegality as a defense even though it may be alleging his own turpitude."

In the case of *Dippel v. Brunozzi,* (decided June 1950) 365 Pa. 264, 74 Atl. 2d 112, the Supreme Court of Pennsylvania stated with reference to Sec. 904 of the Emergency Price Control Act:

> "Therefore such a sale or such a purchase, during the time when the act was in effect, was against public policy and consequently unenforceable. This accords with the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violation of such provision is illegal and void."

In the case of *Palmer v. Mayer,* (decided Feb. 1947) 330 Ill. App. 619, 71 N. E. 2d 822, the Court held where the purpose of a contract was to defeat the operation of the Emergency Price Control Act and regulations of the Office of Price Administration with reference to sugar and both parties to the contract knew that they were engaging in an unlawful undertaking, no recovery could be had for breach of the contract by one of the parties.

In the case of *International Spangles Corp. v. Marrow Mfg. Co.,* (decided May 1945) 294 N. Y. 295, 62 N. E. 2d 77, the Court of Appeals of the State of New York denied a recovery for merchandise sold and delivered where plaintiff failed to show it had established a maximum price for the merchandise in accordance with the

Emergency Price Control Act holding that plaintiffs demand for the price of the commodity delivered to the defendant is legally unenforceable, citing various New York cases to support said ruling.

In the case of *Perma-Stone Corp. v. Merkel,* 255 Wis. 565, (decided Nov. 1949) 39 N. W. 2d 730, plaintiff sought to forclose a mechanic's lien for labor and materials furnished to defendant. Defendant contended the price charged was in excess of the O. P. A. ceiling. The Court denied foreclosure of the lien but awarded plaintiff damages against defendant for breach of contract. In reversing the judgment the Supreme Court of Wisconsin stated: "Plaintiff's violation of O. P. A. regulations pertaining to prices is a defense in a civil action to recover damages for breach of contract."

In Appellee Crane's brief (pp. 23 and 24) two cases are referred to which deny a recovery of damages against a seller where the contract violated O. P. A. regulations.

It will thus be seen that we have presented to this Court four cases of courts of last resort where claims for damages were denied where defendant refused to carry out a contract for sale at a price in excess of O. P. A. ceiling. We have also cited herein and in Appellee's brief many cases where the courts have held void contracts which violate O. P. A. ceilings.

As against this showing Denunzio has not cited one case where the court has awarded damages against a seller who refused to carry out a sale at a price in excess of O. P. A. ceilings.

III.

The Effect of the Agreement to Pay Crane a Commission.

The evidence showed that Crane was to get $50.00 a car commission which, when divided by the average number of boxes in a car, amounted to 0.454 a box. The ceiling price that Kazanjian could charge was $2.50 as contended for by Crane, or $2.53 as contended for by Denunzio. Adding the price paid to Kazanjian to the commission to be paid to Crane brings the price in excess of the ceiling price regardless of whose contention is adopted as to the ceiling price.

Maximum Price Regulation 426, Sec. 11 provides that "the price limitations * * * shall not be evaded by way of commission * * * or any other charge * * *".

The payment of the ceiling price to the seller and a commission to the seller's agent was in effect a payment of the total amount to the seller and the contract thereupon violated the price regulations.

In the case of *Fowler v. Equitable Trust Co.* 141 U. S. 385, 35 L. Ed. 786, the Court held that an agreement to pay the highest rate of interest under the law to a lender of money and the payment by the borrower to the lender's agent of a commission for making the loan constituted a payment to the lender in excess of the lawful rate and "rendered this loan usurious".

In the case of *Walker v. Bailey* (Ala.) 33 So. 2d 891 (referred to on p. 25 of appellee Crane's brief) the Court

held that the payment by the purchaser of a part of the purchase price to the seller and a part to his agent (both amounts when added together exceeding the O. P. A. ceiling) made the contract illegal and unenforceable.

In the case of *Blumenthal v. U. S.* 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (referred to on page 27 of appellee Crane's brief) the Court sustained a conviction for conspiracy to violate the Emergency Price Control Act in the sale of liquor where the seller was paid ceiling and his intermediaries received various sums of money for their part in the transaction.

The effect of this agreement to pay the seller the ceiling price and his agent a commission, voided the contract and made it unenforceable.

IV.
The Equities of This Case.

Crane was acting as an agent. He contended he was a procuring broker or agent of the buyer. Judge O'Connor held him to be the agent of the seller. He disclosed the name of the seller [Ex. 1-E; Tr. p. 33] before the so-called agreement was consummated.

The most that Crane could receive was $150.00—the amount Denunzio was agreeing to pay him as a procuring broker. Under Judge O'Connor's decision Crane is ordered to pay damages, interest and attorney's fees in excess of $9700.00. [Tr. p. 151.]

Certainly the equities of this case require a rehearing of this action.

Conclusion.

We submit that a rehearing should be granted in this matter and the decision of Judge Carter should be affirmed.

Respectfully submitted,

HENRY O. WACKERBARTH,

Attorney for Appellee and Cross-Appellant Crane, Doing Business as Associated Fruit Distributors.

Certificate of Counsel.

The undersigned, Henry O. Wackerbarth, attorney for Raymond M. Crane, doing business as Associated Fruit Distributors, appellee herein, does hereby certify that in his judgment the petition for rehearing is well founded and it is not interposed for delay.

HENRY O. WACKERBARTH.

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Central Fruit & Vegetable Co., and West Texas Produce Company,

Appellants,

vs.

Associated Fruit Distributors of California, Raymond M. Crane, Red Lion Packing Company and John C. Kazanjian,

Appellees.

OPENING BRIEF OF APPELLANTS.

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Appellees.

OPENING BRIEF OF APPELLANTS.

Jurisdictional Statement.

This case originated with a complaint filed with the Secretary of Agriculture under the *Perishable Agricultural Commodities Act,* 7 U. S. C. A., Section 499, by Central Fruit and Vegetable Co. (hereinafter referred to as "Central Fruit") and West Texas Produce Co. (hereinafter referred to as "West Texas Produce"), appellants herein, against Raymond M. Crane, doing business as Associated Fruit Distributors (hereinafter referred to as

"Crane") and John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as "Kazanjian"). [Tr. p. 16.] The jurisdiction of the Secretary of Agriculture upon such complaint was derived from 7 U. S. C. A., Section 499f(a).

After formal hearing on the issues raised by the complaint and the answers of Crane and Kazanjian [Tr. pp. 33 and 38], the Secretary of Agriculture awarded reparation damages in favor of Central Fruit against Kazanjian in the amount of $6,133.26, in favor of West Texas Produce against Kazanjian in the sum of $10,112.16, together with interest on each award at 5% per annum from December 10, 1944, until paid. The complaint was dismissed as to Crane. [Tr. p. 63.]

Kazanjian appealed to the United States District Court for the Southern District of California under the provisions of 7 U. S. C. A., Section 499g(c). [Tr. p. 3.]

The District Court conducted a trial *de novo,* as a result of which it rendered a judgment dismissing the action as against both Crane and Kazanjian. [Tr. p. 84.] It is from such judgment that this appeal is taken to this court.

A motion for new trial [Tr. p. 88] was denied by the District Court. [Tr. p. 108.] Within the time permitted by law, notice of appeal to this court was duly filed. [Tr. p. 109.]

This court is vested with jurisdiction on appeal from the final decision of the District Court by virtue of the provisions of 28 U. S. C. A., Section 1291.

Statement of the Case.

Succinctly stated, the facts of this case are these:

Crane, a Los Angeles fruit broker, had discussed with Kazanjian, a grower, the sale of Kazanjian's grapes out of storage, Crane to provide the storage facilities. [Tr. pp. 336, 337.] Crane had handled the sales of most, if not all, of Kazanjian's grapes during 1944. [Tr. p. 350.]

On September 26, 1944, Crane transmitted to 13 brokers, including Margules (Southwest Brokerage Company of Dallas, Texas) what is known as a "booking" telegram.* Crane advised these brokers that he could book nine cars of Emperor grapes U. S. No. 1 quality and nine cars of Emperor grapes of unclassified quality, all at a price of $2.53 per lug net to the shipper, that the offer was being made subject to confirmation, that the terms called for $500.00 per car part payment upon confirmation of the sale, that delivery would be made out of storage on and after December 10th, packing to commence about October 9th, and that the buyer was to pay a $50.00 per car procurement brokerage charge to Crane. [Tr. p. 450.]

Several days later, on October 2nd, Crane sent a further telegram to the aforementioned brokers advising that he had secured a revised deal, and that he was now quoting 15 cars of Emperor grapes of U. S. No. 1 quality at a price of $2.50 per lug, otherwise the same transaction as previously indicated. [Tr. p. 451.]

On October 2, 1944, Margules, by teletype, notified Crane that the deal was "okay" as to 6 cars to Fort Worth

*For the convenience of the court all of the telegrams and teletype messages appear in chronological order in the Appendix to this brief.

and 4 cars to Dallas at $2.50 net, and $50.00 per car commission to Crane if such commission were legal. [Tr. p. 475.] Crane immediately replied by teletype that he hadn't been able to contact the shipper as yet but was certain that the deal was satisfactory. He said he would wire Margules definitely one way or the other as soon as he had contacted the shipper. He also assured Margules that it was entirely legal for the receiver to pay a buying brokerage commission. In this teletype message, Crane revised the previous terms by stating that he understood a $1,000.00 per car deposit would be required to be paid upon each U. S. No. 1 inspection at the time the grapes were loaded. [Tr. pp. 475, 476.]

By teletype message immediately following, Margules advised Crane that as far as he knew, that covered the transaction, and he requested Crane to wire him that evening. [Tr. p. 476.] That same evening, Crane sent a telegram to Margules stating definitely that he had secured confirmation from Kazanjian on the ten cars of grapes "as outlined." He requested that Margules collect the deposits so that they could be forwarded to Crane as soon as government inspection reports had been wired upon each car. [Tr. p. 25.]

The next morning, October 3rd, Crane sent a teletype message to Margules in which he inquired as to whether Margules had sold the entire 10 cars of Emperors. [Tr. p. 474.] By teletype message, Margules immediately expressed surprise at the inquiry, stating that he had ordered and Crane had confirmed the 10 cars by telegram of the previous day. [Tr. p. 475.]

On the same day, Crane, apparently after a telephone conversation with Kazanjian, sent a telegram to Kazan-

jian stating unequivocally that he had sold for Kazanjian's account at a price of $2.50 per lug net to Kazanjian, *10 cars of Emperors, $1,000.00 per car deposit,* and 5 cars of Emperors, $750.00 per car deposit. He further stated that he was depending upon Kazanjian to permit him to handle the balance of the cars that Kazanjian had mentioned for fresh shipment. He also stated that he would forward confirmations to Kazanjian for signature as soon as they were received via air mail from the buyers. [Tr. p. 453.]

On October 3rd, Margules sent triplicates of a form known as Standard Memorandum of Sale to each, Central Fruit, West Texas Produce, and Crane. This memorandum described the seller as Associated Fruit Distributors (Crane) for the account of Kazanjian. The terms specified in such memorandum of sale were the terms theretofore submitted by Crane to Margules. The Standard Memorandum of Sale was signed by Margules as broker. [Tr. pp. 26-28.]

On October 4th, Kazanjian sent a telegram to Crane in which he stated that the sale of 15 cars of storage U. S. No. 1 Emperor grapes for conversion on December 10th, was satisfactory at $2.50 f.o.b. Exeter; that the deposits were to be paid immediately on inspection at the shipping point; that Crane was to arrange for the storage as he had agreed; that Kazanjian intended to load the balance of his pack after October 20th and would be glad to make a deal on the same about October 15th. [Tr. p. 454.]

On October 10, 1944, Margules sent a telegram to Crane stating that he understood that the O. P. A. ceiling price on table grapes had been eliminated, and he wanted to know whether there was anything to prevent immediate

shipment of some of the cars, instead of placing them all in storage. [Tr. p. 481.] Crane thereupon replied by telegram to Margules, stating that Kazanjian, the shipper, took the view that the lifting of the ceiling price had voided any contracts as to Emperor grapes. He stated that Kazanjian was willing to give a trade preference to appellants for grapes already packed at the market price which that day was $3.25 per lug. [Tr. p. 481.] Kazanjian admits that Crane acted as his agent in making such counter-offer. [Tr. p. 289.]

Margules then immediately communicated by telegram with T. C. Curry, War Food Administrator, in Washington D. C., and inquired whether the effect of lifting the ceiling price was to invalidate existing contracts such as the instant one. [Tr. p. 482.] The following day (October 11th), the War Food Administrator replied to Margules by telegram, advising that the lifting of the O. P. A. ceiling would have no such effect. [Tr. p. 479.] Margules thereupon immediately sent a telegram to Crane advising of the War Food Administration opinion, and requesting that Crane get a definite answer one way or the other from Kazanjian as to whether the contract would be performed. [Tr. p. 480.]

On October 12th, Crane telegraphed Margules that Kazanjian was willing to sell *uninspected* Emperor grapes at $3.00 per lug, plus a 10¢ per lug procurement charge to Crane; that Kazanjian felt that by making such offer, he was relieved of all moral responsibility, and that Kazanjian was turning down offers for his entire outfit that day on the basis of $3.40 per lug cash. [Tr. p. 476.]

On October 13, 1944, Margules rejected Kazanjian's compromise offer and once again requested immediate advise by wire as to whether the contract of sale would

be fulfilled by the seller. [Tr. p. 479.] Also, that same day, Margules, by telegram, made a similar demand directly upon Kazanjian. [Tr. p. 477.]

On October 16, 1944, Crane, by teletype message, notified Margules that he had again talked to Kazanjian, who was definitely unwilling to abide by any sale made where the ceiling had been a definite consideration, and Crane suggested that Margules take whatever action he deemed advisable. [Tr. p. 482.]

The foregoing facts are undisputed, and in the main, are evidenced by the written communications of the parties. Based upon these facts, the Secretary of Agriculture found that on October 2, 1944, Kazanjian had orally authorized Crane to confirm the sale to Central Fruit and West Texas Produce; that Crane as a broker, was not solely the agent of the buyers, but was also the agent of the seller for the purpose of locating buyers and transmitting offers and counteroffers; that the statute of frauds of the State of California did not render the sale unenforceable as there was a sufficient memorandum of the sale in writing from the various telegrams and teletype messages which satisfied the statute of frauds; that the telegram of October 4, 1944, from Kazanjian to Crane constituted a written ratification by Kazanjian of Crane's authority to confirm the sale on his behalf; and, that Kazanjian was therefore liable to Central Fruit and West Texas Produce Co. for wrongful refusal to deliver the grapes which he had contracted to sell. [Tr. pp. 41-63.]

Based upon the same documentary evidence, the District Judge, on trial *de novo,* held that by the use of the words "part payment with confirmation," and, "subject to confirmation" in Crane's original offering telegram of

September 26, 1944, *Crane intended* that the sale be negotiated by use of a form known as "Standard Confirmation of Sale"; that Crane acted as buying broker and agent for appellant buyers and was not the agent for Kazanjian in this transaction; that the telegrams which Crane sent to Margules required that any contract entered into would be confirmed in writing by all parties, and in particular, Kazanjian; that Kazanjian never accepted the terms allegedly proposed by Margules; that neither Margules nor appellants ever accepted terms allegedly proposed by Kazanjian to Crane in his telegram of October 4th; that no binding contract could have been entered into by either Margules or Crane in behalf of appellants because of the absence of written authority for such agency in accordance with California law; that Crane did not misrepresent any facts whatsoever to Margules or appellants; and, that none of the statements made by Crane were fraudulent or created liability on his part. The District Judge also found that the price agreed upon for the grapes was in excess of the permissible price under the Federal Emergency Price Control Act, but he drew no conclusion of law therefrom, except that in his memorandum opinion, the District Judge stated that he desired to indicate to counsel that if he is reversed by the higher courts on the question of whether there was a contract or not, he would then hold that the contract was in violation of the maximum price regulation. The District Judge further stated that, if reversed, he would find that the damages would be determined by the market value of grapes on October 24, 1944, the first date when appellants purchased some replacement grapes. A finding to such latter effect was included in the findings of fact, conclusions of law and judgment.

Questions on Appeal.

The questions upon this appeal arise from the error of the District Court both as to findings of fact and conclusions of law. These questions may concisely be stated as follows:

1. Was not Crane a broker acting for both buyers and seller, and the agent of both in this transaction?

2. Was there a contract between the parties?

   (a) Was Crane's uncommunicated intention that a Standard Confirmation of Sale be used in consummating the sale, binding upon either buyer or seller without notice of such undisclosed intention?

   (b) Was it proper for the District Court to admit parol evidence of an undisclosed intention for the purpose of varying an unambiguous provision of a contract?

   (c) Was there anything in Crane's telegrams to Margules which can support the finding of fact by the District Judge that these telegrams required that the contract of sale be signed by all parties, particularly Kazanjian?

   (d) Were there any new terms proposed by Margules?

   (e) Were terms proposed by Kazanjian in his telegram to Crane of October 4th which required acceptance by Margules or appellants?

3. Is the contract of sale herein unenforceable because of the provisions of the statute of frauds of the State of California?

    (a) Does the statute of frauds of the State of California apply to this type of proceeding?

    (b) Even if applicable herein, does not the California Statute of Frauds apply only to the "party to be charged"?

4. If it is not true that Kazanjian authorized Crane to notify Margules that Kazanjian had confirmed the sale, was it not a misrepresentation for Crane to notify Margules that Kazanjian had confirmed the sale?

5. Was the contract herein in violation of the Emergency Price Control Act and therefore void?

6. Does the fact that on October 24th, appellants commenced purchasing replacement grapes in an effort to minimize damages, constitute an acquiescence in the repudiation of the contract, and thus establish October 24th as the date for measuring damages as distinguished from December 10th, the date of performance under the provisions of the contract?

Specification of Errors.

I.

Error as to Finding of Fact No. V that Crane intended "subject to confirmation" and "part payment with confirmation" in his September 26, 1944, telegram to mean a form known as "Standard Confirmation of Sale," such error consisting of: (a) irreconcilable conflict between the finding and the testimony of Crane that he did not consider any other document necessary after he received the Standard Memorandum of Sale; (b) irreconcilable conflict with Crane's testimony that telegrams are sufficient confirmation; (c) irreconcilable conflict between the finding and Crane's testimony that the word "confirmation" does not necessarily mean a "Standard Confirmation of Sale"; (d) irreconcilable conflict with the evidence of Crane's conduct in failing to object to the Standard Memorandum of Sale and failing to request a Standard Confirmation of Sale; (e) irreconcilable conflict with the testimony of Crane's traffic manager that the transaction did not contemplate a Standard Confirmation of Sale; (f) inherent improbability of the finding because of its attributing an artificial meaning to plain and unambiguous language; (g) inherent improbability of such finding in relationship to the trade meaning of such terms as disclosed by the rules of the Secretary of Agriculture which are printed on both Standard Confirmation of Sale and the Standard Memorandum of Sale forms; and, (h) the fact that such finding was induced by the District Court's erroneous view of the law that a unilateral and uncommunicated special intention as to the meaning of plain language by one party to a contract can bind other parties to the contract.

II.

Error as to that portion of Finding No. IX that the parties never entered into a written agreement of sale, such error consisting of: (a) the lack of any findings of fact or evidence to justify such finding, which is in reality a conclusion; and, (b) irreconcilable conflict between the finding and the exchange of telegraphic communications between the parties which appear in the appendix hereto, and which constitute a written contract of sale.

III.

Error as to that portion of Finding No. IX that Kazanjian at no time executed a written ratification of the sale, said error consisting of the failure of the District Court to give effect to Kazanjian's telegram to Crane of October 4, 1944, in which Kazanjian ratified Crane's sale of grapes for Kazanjian's account.

IV.

Error as to that portion of Finding No. IX that appellants had contracted to pay a sum in excess of the ceiling price established under the Emergency Price Control Act, in that the evidence reveals that the price for the grapes was not in excess of the ceiling price, and the $50.00 per car constituted a procurement charge paid by the buyer to a procurement broker, and was not part of the purchase price of the commodity sold.

V.

Error as to that portion of Finding No. X that the statements made by Crane to Margules were not false or fraudulent and were made without any intention to defraud Margules or the appellants, such error consisting

of: (a) inherent impossibility of such a finding if the District Court were correct in its conclusion that Kazanjian had not authorized Crane to confirm the sale, the court having found that Crane did notify Margules that Kazanjian had confirmed the sale; (b) irreconcilable conflict with the testimony of Crane that he intended Margules and appellants to rely upon his notification to them that Kazanjian had confirmed the sale; and, (c) inherent improbability of the finding in the light of Kazanjian's testimony that Crane advised him to ignore appellants' demand for performance of the contract.

VI.

Error as to that portion of Finding No. X that Kazanjian did not have any agent carrying on any transactions in his behalf with any person outside of the State of California, such error consisting of: (a) irreconcilable conflict of such finding with the testimony of Kazanjian that he had asked Crane to secure for him a storage deal, and had arranged with Crane to provide the storage facilities therefore; (b) irreconcilable conflict with the testimony of Crane that Kazanjian had authorized him to submit a storage deal on Emperor grapes at ceiling prices; (c) irreconcilable conflict with the testimony of Crane that Kazanjian was at all times familiar with Crane's negotiations in this transaction and approved of same; (d) irreconcilable conflict with the testimony of both Kazanjian and Crane, that Crane acted as Kazanjian's agent for the sale of Kazanjian's grapes during 1944, and he was his agent for such purpose both before and after the period in which ceiling prices applied to the sale of such grapes; (e) irreconcilable conflict with the testimony of Kazanjian that Crane was his agent in

connection with the counter-offer made by Kazanjian to appellants after the repudiation of the contract by Kazanjian; and, (f) the fact that the District Court was induced into such finding by an erroneous view of the law, wherein the District Court failed to recognize that a broker is an intermediary who may act for both buyer and seller, and to the extent to which his allegiance favored Kazanjian, with Kazanjian's approval, he was the agent of Kazanjian.

VII.

Error as to that portion of Finding No. X that the parties never at any time finally agreed upon the terms of the contract for the sale of the 10 cars of grapes and that there was no meeting of the minds of the parties as to the terms of the proposed sale, such error consisting of: (a) irreconcilable conflict between such finding and the written communications exchanged between the parties which appear in the appendix herein which clearly evidence a full and complete meeting of the minds of the parties hereto; (b) inherent improbability of such finding in relationship to the conduct of the parties, the evidence revealing that the only claim or excuse for the breach of contract which was mentioned in the correspondence of the parties was based upon an alleged frustration of the contract by virtue of the lifting of the ceiling price on grapes; (c) the absence of any findings of fact or credible evidence to justify the finding, which is in fact, a conclusion of law; and, (d) the failure of such finding to specify wherein there was any disagreement of the parties with respect to the terms of the contract or sale agreed upon.

VIII.

Error as to Conclusion No. 2 to the effect that the telegram sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to the proposed contract and in particular, Kazanjian, such error consisting of the fact that the said telegrams do not contain any such requirement expressly or impliedly.

IX.

Error as to Conclusion No. 2 to the effect that Kazanjian never accepted the terms proposed by Margules and that the terms proposed by Kazanjian to Crane in his telegram of October 4th, were never accepted by Margules or appellants, such error consisting of: (a) the absence of finding of fact or evidence to justify such conclusion; (b) the absence of evidence that Margules ever proposed any terms; and, (c) the fact that the telegram of October 4th from Kazanjian to Crane did not propose new terms requiring acceptance by Margules or complainants.

X.

Error as to Conclusion No. 3 to the effect that no binding contract could have been entered into by Margules or Crane in behalf of the appellants unless the authority to Margules and Crane was in writing, the District Court having thereby erroneously held that the statute of frauds of the State of California is applicable to a reparation proceeding brought under the Perishable Agricultural Commodities Act, and the District Court further having erroneously held that the statute of frauds of the State of California requires that a memorandum of the agreement be signed not only "by the party to be charged" but by the "charging party" as well.

XI.

Error as to Conclusion No. 4 to the effect that appellants acquiesced in the repudiation of the contract on October 24, 1944, by undertaking to replace the grapes and that the measure of damage would therefore arise as of October 24, 1944, such error consisting of: (a) the absence of findings of fact or evidence justifying a conclusion that the appellants ever acquiesced in the repudiation by Kazanjian; (b) the purchase of replacement grapes was proper to minimize damages and did not constitute an acquiescence in the repudiation; (c) the District Court erred in failing to recognize that the proper measure of damage in this case is based upon the value of the grapes as of December 10, 1944, the date of contractual delivery, and not the date of repudiation or the date of the purchase of some replacement grapes.

XII.

Error as to Conclusion No. 5 that Crane did not misrepresent any facts to Margules or appellants with reference to the contract, that statements or representations by Crane were not fraudulent, and that no liability arose on the part of Crane for statements made by him to Margules or appellants. Appellants specify the foregoing error only upon the assumption, which is not conceded, that Kazanjian had not confirmed the sale.

XIII.

Error as to Finding of Fact No. VIII that up to November 15, 1944, the reasonable market value of U. S. No. 1 Emperor grapes in carload lots was $3.25 per lug, such error consisting of: (a) the date of December 10, 1944, was the determinative date and (b) the evidence reveals that Kazanjian turned down $3.40 per lug for uninspected grapes as early as October 12, 1944.

XIV.

Error with respect to the admission of evidence as follows:

"Q. Now, Mr. Crane, when you sent the original telegram to Southwest Brokerage of September 26th, and when you sent the amended telegram of October 2nd presenting this offer to procure grapes and in which you used the words '*subject to confirmation,*' were you in that telegram referring to a confirmation by the use of a Standard Confirmation of Sale as known to the trade?

Mr. Hoppenstein: Just a minute. We object to that on the ground that it would be attempting to vary the terms of his own written instrument, and would be an attempt to invade the mental processes of Mr. Crane.

The Court: Objection overruled.

Mr. Hoppenstein: His intention not having been conveyed to the complainants—

The Court: This testimony goes to the custom of the trade. In other words, whether it was his intention to vary the custom of the trade or to follow the custom of the trade.

You may answer the question.

* * * * * * * *

The Witness: Yes, sir." [Tr. pp. 236, 237.]

XV.

The District Court erred in dismissing the action as to Kazanjian.

XVI.

If the dismissal as to Kazanjian was not error, it was error to dismiss the action as to Crane.

Summary of Argument.

Crane was more than procurement broker for appellants. He was a broker acting as intermediary between negotiating parties. He acted as agent for both seller and buyers.

The *prima facie* and presumptive effect of the Secretary of Agriculture's findings and order were never overcome by credible and competent evidence.

The contract of sale, as evidenced in writing, clearly establishes a meeting of the minds.

The finding by the District Court that Crane intended "subject to confirmation" and "part payment with confirmation" to mean execution of a Standard Confirmation of Sale form is erroneous. It is contrary to the plain and ordinary meaning of the language. It is contrary to the trade meaning of the language. It is contrary to Crane's testimony and conduct. It is clearly an "afterthought," such contention not having been mentioned in the correspondence of the parties or before the Secretary of Agriculture. It is an uncommunicated intention, and therefore not binding upon parties unaware thereof. It was error to receive testimony of such intention over appellants' objections.

The District Court read into the contract "requirements" which were not part of the contract. It erroneously construed a confirmation as a proposal of new terms.

The absence of written authority from appellants to their broker did not render the contract unenforceable. A reparation proceeding under the Perishable Agricultural Commodities Act is not barred by the California Statute of Frauds. The appellants were not the parties "to be charged" in this proceeding. The agency between appellants and Margules is governed by Texas law where the Statute of Frauds does not apply to this type of transaction.

The District Judge not only erroneously held that Kazanjian had not confirmed the sale, but he also held that it was not a false statement for Crane to notify appellants that Kazanjian had confirmed the sale.

The contract is not void because of a violation of the regulations under the Emergency Price Control Act. The commission which appellants agreed to pay for procurement services to Crane was not part of the purchase price of the grapes to Kazanjian.

Damages are properly measured as of the date when delivery should have been made under the contract, not the date of repudiation. Efforts to replace the grapes prior to such date for the purpose of minimizing damages does not constitute an acquiescence or acceptance of the repudiation or breach.

ARGUMENT.

I.

The District Court Erred in Holding That Crane Was Solely the Agent of Appellants. The Evidence Discloses That Crane Acted as a Broker, and in Such Capacity Acted as Agent for Both Appellants and Appellee Kazanjian.

Before consideration of the question as to whether or not a contract had been reached by the parties, it is appropriate that we consider the relationship of appellee Crane to the other parties in this proceeding. The District Court held that Crane was a broker who was solely the agent of appellants.

The evidence before the District Court upon this subject matter consisted of the following:

1. The *prima facie* effect of the conclusion of the Secretary of Agriculture that Crane, as a broker, was the agent of both the seller and the buyers in this transaction. [Tr. pp. 52, 53.]

2. Testimony that Crane acted as agent for Kazanjian in the sale of Kazanjian's grapes, both before and after, but not during the period of time within which O. P. A. ceiling prices were in effect upon grapes. [Tr. pp. 306, 307, 361, 362.]

3. Testimony of Kazanjian that he had asked Crane to submit a storage deal to him with respect to Emperor grapes. [Tr. pp. 336, 337.]

4. Testimony of Crane that Kazanjian was at all times fully informed of the telegrams and communications between Crane and other brokers respecting negotiations for the sale of Kazanjian's grapes. [Tr. pp. 212, 213.]

5. Kazanjian's denial of such knowledge. [Tr. p. 176.]

6. Kazanjian's admission, however, that he may have been aware of these negotiations. [Tr. pp. 176, 177.]

7. Kazanjian's admission that in connection with the sale from storage of Kazanjian's grapes, Crane was to arrange storage facilities for Kazanjian. [Tr. p. 175.]

8. Testimony by Kazanjian that he and Crane were in constant communication with each other during the periods of time aforementioned. [Tr. p. 176.]

9. Testimony of Crane that he notified Kazanjian of the sale for his account by telephone conversation of October 2, 1944. [Tr. pp. 308, 309.]

10. Written notification by Crane to Kazanjian on October 3, 1944, that *Crane had sold grapes for Kazanjian's account.* [Tr. p. 453.]

11. *Written approval by Kazanjian on October 4, 1944,* of Crane's sale of grapes for Kazanjian's account. [Tr. p. 454.]

12. Crane's acceptance without objection of the Standard Memorandum of Sale sent him on October 3, 1944, by Margules, in which document Crane is denominated as seller *for the account of Kazanjian.* [Tr. p. 26.]

13. Proposal of a new offer by Kazanjian through Crane for grapes at a price of $3.25, *as to which proposal Kazanjian admitted that Crane was acting as his agent.* [Tr. pp. 481, 289.]

14. Notification by Margules to Kazanjian on October 13, 1944, of reliance upon *confirmation by Kazanjian*

through Crane, and Kazanjian's failure to deny same. [Tr. p. 477.]

A broker is defined as an intermediary between two negotiating parties. *Rhode v. Bartholomew,* 94 Cal. App. 2d 272, 278, 210 P. 2d 768. In this capacity, he may act as agent for either party or for both parties. *Vahlsing v. Rothstein,* 107 Pa. Supp. 281, 163 Atl. 350.

In 12 *Corpus Juris Secundum,* Sec. 3, p. 8, distinguishing between brokers and other agents generally, it is said:

> "A broker is distinguished from an agent, in that a broker holds himself out for employment by others, and acts as an *intermediate negotiator between the parties* to a transaction, and in a sense is the *agent of both* parties, whereas the elements of exclusiveness of representation of the principal by which he is employed enters into the employment of an agent." (Emphasis supplied.)

Kazanjian did not agree to pay a brokerage commission to Crane because market conditions were such that Crane could get himself employed as the procurement broker of the buyer, thereby passing the cost of the brokerage commission to the buyer. [Tr. p. 361.] Appellants, as buyers in this case, accepted these terms, and accepted Crane as their procurement broker.

Consistent with these facts, Crane procured written confirmation of the sale to appellants from Kazanjian as seller. Crane notified Kazanjian both by telephone and by telegram that he had sold the grapes *for Kazanjian's account.* [Tr. pp. 210, 308, 453.] In doing this, he clearly indicated to Kazanjian that he had acted as agent

for Kazanjian in confirming the sale of the grapes. Kazanjian thereupon notified Crane by telegram that such confirmation in his behalf was satisfactory, thus ratifying Crane's authority for such purpose. [Tr. p. 454.]

On October 10, 1944, the O. P. A. ceiling price on grapes was lifted. Crane notified appellants through their Dallas broker, that Kazanjian repudiated the contract of sale. In this very same message, Crane submitted a counterproposal by Kazanjian to sell grapes already packed at $3.25 per lug. Kazanjian specifically admitted that in making such offer, Crane was acting as his agent. [Tr. p. 289.] In the exchange of telegrams relating to the right of Kazanjian to repudiate the transaction, Crane continuously referred to *instructions given to him by Kazanjian.*

It will be noted from the evidence that Crane performed the normal functions of a broker who represents both buyers and seller, with both buyers and seller fully aware of the dual relationship. Upon these facts, a conclusion that Crane was solely the agent of the buyer is clearly contrary to the evidence and is incompatible with reason and logic.

Significant evidence that Crane was agent for buyers in name only, and that his true fealty was attuned to Kazanjian is deductible from the following testimony given by Kazanjian:

> "I know Ray (Crane) called up once and said they (the buyers) made a demand on the grapes, but he (Crane) said, 'The hell with *them*. *We* have no deal. Let *them* holler for them all *they* want to.' Those are the very words he used to the best of my recollection." [Tr. p. 290.] (Emphasis supplied.)

In the foregoing excerpt we detect a loyalty and an allegiance from Crane to Kazanjian in sharp contrast to a complete disavowal of interest by Crane in the rights of appellants.

While some contradictory effect to the Secretary's finding may be attributed to the self-serving conclusion of Crane that he was solely the agent of appellants and the self-serving denial by Kazanjian that he had not authorized Crane to act in his behalf, it is obvious that not only was the Secretary's conclusion not overcome thereby, but the testimony of appellees was negatived by Crane's own written admission that he had sold the grapes for Kazanjian's account [Tr. p. 453] and by Kazanjian's own written admission that the sale effected by Crane for his account was satisfactory. [Tr. p. 454.]

The question of Crane's relationship to Kazanjian as an agent is not a crucial one. Even if Crane had been solely the agent of the buyers, Kazanjian is nevertheless liable for the breach of contract. It is immaterial whether he breached the contract through Crane as agent for the seller, or as agent for the buyer, or as we contend, as a broker acting for both buyer and seller.

The Secretary's finding however, that Crane was a broker acting as agent for both buyer and seller was *prima facie* evidence of such fact, and *presumptive* thereof *until overcome* (as distinguished from merely *contradicted by*) other evidence.

Prima facie evidence in the absence of controlling evidence or discrediting circumstances becomes conclusive of the fact.

> *Kelly v. Jackson*, 31 U. S. 622, 6 Pet. 622, 8 L. Ed. 523.

When *prima facie* evidence is introduced, its effect is not destroyed by introduction of contradictory evidence. It stands as proof of that particular fact until it is *both contradicted and overcome by such other evidence.*

Miller and Lux v. Secara, 193 Cal. 755, 227 Pac. 171.

Under the *Perishable Agriculture Commodities Act,* the courts have held that the *prima facie* effect of the Secretary's findings and orders must be *overcome* by the contradictory evidence.

Thus, in the case of *Farris v. Meyer Schuman Co.,* 115 F. 2d 577 (C. C. A. 7th) at page 579, the court said:

"Under 7 U. S. C. A., Sec. 499g(c), section 7(c) of the Perishable Agricultural Commodities Act * * * the trial on such appeal shall be *de novo* and shall proceed in all other respects as other civil suits for damages, except that the findings of fact and the orders of the Secretary shall be *prima facie* evidence of the facts therein stated. It has been held that the facts found by the Secretary shall stand as the *established facts until sufficient evidence is produced on the trial to overcome them. Spano v. Western Fruit Growers, Inc.,* 10 Cir., 83 F. 2d 150, 152. *See also Blair v. Cleveland, C., C. & St. L. Ry. Co.,* D. C. 45 F. 2d 792, and cases cited therein." (Emphasis supplied.)

In a case involving substantially the same set of facts as well as the same defendants as herein involved, *Joseph Denunzio Fruit Co. v. Crane,* 79 Fed. Supp. 117, 133 (affirmed by this court 188 F. 2d 569), the trial court stated that it was "fantastic" and the credulity of the court was taxed by Crane's contention that he was a buying agent or buying broker. It is our view that although

Crane may technically have occupied the status of buying broker for appellants, he was primarily the representative and agent of Kazanjian, the seller, and that Crane sold for the account of the seller and secured the seller's written ratification and confirmation of such sale.

II.

The Undisputed Evidence Established the Existence of a Binding Contract Between the Parties Hereto.

The contract upon which this action is based is established by undisputed physical evidence, written communications, convenient resort to which may be had in the appendix to this brief. The findings of fact, both of the Secretary of Agriculture and the District Court embrace the text of such communications.

Under Section 1550 of the *Civil Code* of the State of California, a contract requires: (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4) consideration.

The decision being reviewed on this appeal does not question the existence of parties capable of contracting or the existence of consideration. The conclusions reached by the District Court do not involve the lawfulness of the object of the contract, although the findings of fact indicate that the contract sought to accomplish an illegal purpose, to-wit: the violation of the Emergency Price Control Act. [Tr. p. 80.] The issue of legality will be discussed in a subsequent portion of this brief.

The District Court held that there was no meeting of the minds, thus invalidating the contract of sale for lack of the element of consent. The consent of the parties to

the contract is evidenced by the telegrams and teletype messages that were exchanged between the parties. Insofar as these written communications were not ambiguous, the documents in themselves constitute the contract of the parties. Since the contract can be construed within the borders framed by the four corners of the written instruments, resort to extraneous evidence was error.

Toms v. Hellman, 115 Cal. App. 74, 1 P. 2d 31;

Security-First Nat. T. & S. Bank v. Loftus, 129 Cal. App. 650, 19 P. 2d 297;

Tillis v. Western Fruit Growers, Inc., 44 Cal. App. 2d 826, 113 P. 2d 267.

To support its conclusion that a meeting of the minds was absent in this case, the District Court relied upon the following grounds: (1) Crane, when using the language "subject to confirmation" and "part payment with confirmation," in his original booking telegram of September 26, 1944, intended that such language require that a particular form known as "Standard Confirmation of Sale" be used in the consummation of this transaction [Tr. p. 77]; (2) the telegrams which Crane sent to Margules required that the contract of sale be signed by all of the parties thereto, particularly Kazanjian [Tr. p. 81]; (3) Kazanjian never accepted the terms proposed by Margules [Tr. p. 82]; and, (4) neither Margules nor appellants ever accepted the terms proposed by Kazanjian. [Tr. p. 82.]

In succeeding paragraphs, we will demonstrate that these findings and conclusions were unsupported by credible evidence, are clearly erroneous, and are incompatible with reason and logic.

III.

The District Court's Finding That Crane Intended to Designate a Standard Confirmation Form Is Against the Weight of Credible Evidence.

Two forms of confirmatory documents are used in the interstate perishable agricultural commodities business. One of these documents is known as a "Standard Memorandum of Sale," and the other is known as a "Standard Confirmation of Sale." [Tr. p. 77.] The essential difference between the two documents is in the fact that a Standard Memorandum of Sale is signed by a broker negotiating a sale, and copies are sent to the seller and the buyer. The form known as Standard Confirmation of Sale is signed by the buyer and by the broker or agent for the seller, together with a certification by such broker or agent that he has authority from the seller to sign the same in behalf of the seller. [Tr. p. 78.]

Thus the Department of Agriculture in the case of *Prentice Packing & Cold Storage Co. v. Springer Produce House,* PACA Docket No. 93, S. 129, said:

> "*It is the usual custom throughout the produce trade for the broker to act for both seller and buyer in negotiating sales of this nature* and with this in view, this Department has uniformly held, except in those places where the laws of the jurisdiction are specifically contra, that *the signing of a 'Standard Memorandum of Sale' or a 'Standard Confirmation of Sale' by the broker is sufficient* evidence in writing of the contract to satisfy the requirements of the Statute of Frauds." (Emphasis supplied.)

The use of either of the forms is not mandatory. [Tr. pp. 429, 433.] Crane admitted that a telegram was as sufficient as a Standard Confirmation of Sale. [Tr. pp. 245, 246.] Crane further admitted that as far as the custom of the trade is concerned, the use of a Standard Memorandum of Sale instead of a Standard Confirmation of Sale is entirely an "individual" matter. [Tr. p. 246.] Crane admitted that, *after receiving the Standard Memorandum of Sale from Margules, he considered no other document necessary for the closing of the transaction other than the government inspection reports.* [Tr. p. 249.]

Most transactions are completed through the use of the Standard Memorandum of Sale, which is signed by the broker alone. [Tr. p. 251.] Bockstein, who had been engaged in the interstate produce business since 1905 [Tr. p. 250] didn't believe he ever received a Standard Confirmation of Sale [Tr. p. 251], and he never had occasion to sign one. [Tr. p. 252.] Crane testified that while a Standard Memorandum of Sale is used with respect to goods for immediate delivery, that where *future* delivery is contemplated, the Standard Confirmation of Sale is *always* required. [Tr. p. 216.] The trial court significantly made no finding to such effect.

The court will judicially note that the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry as promulgated by the Secretary of Agriculture appear in small print upon the reverse side of all copies of the forms known as "Standard Memorandum of Sale" and "Standard Confirmation of Sale." Reference to Respondent's Exhibits L and M consisting of a Standard Confirmation of Sale and a Standard Memo-

randum of Sale respectively, will reveal such rules and definitions of trade terms.*

It is noted from Advisory Rule C, covering "Future Sales or Purchases" of Part II of such Standard Rules that the two forms are mentioned in the *alternative* as to *future sales,* as follows:

> "Note: (Advisory)—Added paragraphs or notations covering special agreements, such as future sales, that differ in any way with any part of the Standard Rules and Definitions of Trade Terms should not be printed in a manner that might indicate they are part of such rules. When the Standard Confirmation of Sale or Broker's Memorandum of Sale forms are used for agreements, such notes or special clauses should in every instance be printed, stamped or written on the face of the contract under a heading 'Special Agreement.'"

Crane, himself, admitted that when he sold other Kazanjian grapes in October and November of 1944, he did not secure a Standard Confirmation of Sale. [Tr. p. 247.] He admitted all of these latter sales were also for *future* delivery. [Tr. p. 247.] He further admitted that these transactions were completed entirely upon confirmation by telegraph. [Tr. p. 247.]

Crane's traffic engineer, James P. Coyn, testified that the execution of either Standard Memorandum of Sale

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*Because of the length of these documents, they were not included in the printed transcript. The originals were transmitted to the Clerk with the record on appeal. The use of the forms mentioned are so widespread in the interstate produce industry that the contents thereof may be judicially noted. The rules and regulations adopted by the Department of Agriculture to enforce the Perishable Agricultural Commodities Act are noticeable judicially. *Standard Oil Co. of California v. United States* (C. C. A. 9), 107 F. 2d 402, 413 (as to similar regulations by the Department of Interior).

or Standard Confirmation of Sale is strictly a formality. As Coyn put it, in most of these sales, the negotiation is completed long before the receipt of the memorandum of sale. [Tr. p. 434.] When asked to interpret the language "will forward confirmation for your signature soons received air mail from buyer," which was contained in Crane's October 3rd telegram to Kazanjian, Coyn testified that it was not his understanding from such language that Kazanjian would receive a contract to sign. Coyn testified that the language meant only that Kazanjian would be entitled to get a copy of the memorandum of sale [Tr. p. 433], and that the receipt of such memorandum was not a necessary step to the completion of the transaction. [Tr. p. 434.]

Crane testified that he seldom even looked at the confirmations as they came in, but relied mostly on the wire transactions. [Tr. p. 220.]

Upon the evidence of Crane alone the District Court concluded that the terms of the contract called for a Standard Confirmation of Sale, and that the contract failed because of non-compliance with such requirement. Such conclusion is not only inconsistent with the weight of the evidence, but it is based upon the testimony of a man who was mentally confused as to what he was talking about. A Standard Confirmation of Sale is *signed by the buyer, and by the seller's broker or agent.* [Tr. p. 78.] Crane's total unfamiliarity with a Standard Confirmation of Sale is revealed by his testimony that such a form is *signed by the seller and by the buyer's broker or agent.* [Tr. p. 248.]

The finding of the District Court that Crane intended that the telegram of September 26th require the use of a

Standard Confirmation of Sale, is strictly unilateral. If the District Court had found that Margules, as recipient of the telegram, so understood such language, or should have so understood it, even then it would not follow that the parties hereto had not entered into a binding contract. The terms of the contract had been fully agreed upon, as evidenced by the exchange of telegrams and teletype wires. Assuming that there was an expressed intention that a formal document such as Standard Confirmation of Sale would be executed, it does not follow that such a requirement constitutes a *condition precedent* to the execution of the contract.

In the case of *National Dairymen's Association v. Dean Milk Co.* (C. C. A. 7th), 183 F. 2d 349, where an offer stated that it was subject to government acceptance for export, it was held that such acceptance was not a condition precedent to liability under the contract.

Section 26 of the *Restatement of the Law of Contracts* provides as follows:

> "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in section 25."

See also the case of *Lehigh Structural Steel Company v. Great Lakes Construction Co.* (C. C. A. 2), 72 F. 2d 229, 231, wherein, the court said:

> "This rule is illustrated in the decision of the New York Court of Appeals in Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 74, 29

L. R. A. 431, 43 Am. St. Rep. 757, where a written proposal to sell and deliver certain carloads of apples was accepted with the provision that the agreement should be expressed in a formal writing. The court held that the minds of the parties had met as to all the terms of the contract and that *the subsequent failure to reduce it 'to the precise form intended * * * did not affect the obligations of either party, which had already attached. * * *'* As Justice Holmes said in *American Smelting Co. vs. United States,* 259 U. S. at page 78, 42 S. Ct. 420, 421, 66 L. Ed. 833: 'The expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had.' See our decisions in *Bondy v. Harvest* (C. C. A.), 62 F. (2d) 521, and *United States v. P. J. Carlin Const. Co.* (C. C. A.), 224 F. 859, to the same effect." (Emphasis supplied.)

If the contract in this case actually had not been consummated because of a failure to execute a "Standard Confirmation of Sale" it would appear that such defaulting circumstance would have been mentioned in the correspondence between the parties. An examination of the communications between the parties will reveal no such contention. It would also appear that such contention would have been raised in the trial before the Secretary of Agriculture. An examination of the proceedings before the Secretary of Agriculture will reveal the raising of no such contention.

Crane testified that after he received the telegram of October 4, 1944, from Kazanjian stating that the sale was satisfactory, he did not consider any other documentary evidence necessary to close the deal, other than

the government inspection revealing that the merchandise was U. S. No. 1 grade. [Tr. pp. 249 and 316.]

Crane admitted that the term "confirmation" does not necessarily mean a Standard Confirmation of Sale. [Tr. p. 214.]

When Crane received the Standard Memorandum of Sale from Margules signed by Margules as broker, he made no objections thereto, but merely filed same. [Tr. p. 220.] If, as Crane contends, this was not the form called for by the contract, it is unbelievable that he would not have immediately communicated with Margules advising him that he had used an improper form.

Crane, upon cross-examination, refused to deny that in accordance with the custom of the trade a Standard Memorandum of Sale is considered sufficient, but affirmatively stated that it was entirely "an individual matter." [Tr. p. 246.] *It therefore overwhelmingly appears that the finding of fact by the District Judge that Crane intended "subject to confirmation" and "part payment with confirmation" to mean a Standard Confirmation of Sale, which finding is based solely upon Crane's testimony, is clearly rebutted both by Crane's testimony and by Crane's conduct.*

Findings of fact, even though supported by some substantial evidence, insofar as they are clearly against the weight of the evidence, or are induced by an erroneous view of the law, are not binding upon the appellate court.

> Vol. 12 Cyc. Fed. Proc., p. 267, Sec. 6211;
>
> *Aetna Life Insurance Co. v. Kepler* (C. C. A. 8), 116 F. 2d 1, 5.

A finding is clearly erroneous under Rule 52(a) of the *Rules of Federal Civil Procedure,* when, though there

is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U. S. 364, 395, 92 L. Ed. 746, 68 Sup. Ct. 525.

When it is a matter of interpreting documentary evidence, the appellate court is in as good a position as the trial court to do so, and the appellate court will not necessarily accept the findings of the trial court.

Kind v. Clark (C. C. A. 2), 161 F. 2d 36.

IV.

There Being No Ambiguity in the Terms of Crane's Telegram of September 26, 1944, It Was Error for the District Judge to Permit the Plain Meaning of the Language of Such Telegram to Be Aborted.

Where a written contract contains no ambiguity or uncertainty in its terms, the construction of such contract must be derived solely from the language therein.

Clark v. Tidewater Associated Oil Co., 98 Cal. App. 2d 488, 220 P. 2d 628.

The trade meaning of the phrase "subject to confirmation" is clearly evident from the construction given to such phrase in the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry hereinbefore referred to.

The true meaning of the phrase "subject to confirmation" is evidenced by advisory note No. 2 to Rule E of Part II of such rules and definitions of trade terms. This advisory note reads as follows:

"It is unnecessary, when quoting prices, as distinguished from offering to sell, to give notice that

'all quotations are subject to change in market price and to the goods being unsold on receipt of order' or *'subject to confirmation,'* but the practice is recommended because it helps to make clear to prospective buyers that the quotations are not offers to sell but only invitations for offers to buy."

It must be presumed that Crane must have had such trade definition of "subject to confirmation" in mind.

It is inconceivable that an experienced broker, who was as explicit on other matters as was Crane in his telegram of September 26, 1944, would utilize such common phrases as "subject to confirmation" and "part payment with confirmation" as a means of calling for a specific form of document, if that is what he had in mind.

V.

It Was Error for the District Court to Permit Crane, Over the Objections of Appellants, to Testify That the Use of the Phrase "Subject to Confirmation" in the Telegram of September 26, 1944, Constituted a Reference to Confirmation by Use of a Particular Form.

The following proceedings transpired in the trial of the case:

"Q. Now, Mr. Crane, when you sent the original telegram to Southwest Brokerage of September 26th, and when you sent the amended telegram of October 2nd presenting this offer to procure grapes and in which you used the words 'subject to confirmation,' were you in that telegram referring to a confirmation by the use of a Standard Confirmation of Sale as known to the trade?

Mr. Hoppenstein: Just a minute. We object to that on the ground that it would be attempting to vary the terms of his own written instrument, and would be an attempt to invade the mental processes of Mr. Crane.

The Court: Objection overruled.

Mr. Hoppenstein: His intention not having been conveyed to the complainants—

The Court: This testimony goes to the custom of the trade. In other words, whether it was his intention to vary the custom of the trade or to follow the custom of the trade.

You may answer the question.

* * * * * * * *

The Witness: Yes, sir." [Tr. pp. 236, 237.]

It will be noted from the foregoing excerpt of the trial proceedings, that the trial judge justified his admission of the testimony upon the ground that the testimony went to the "custom of the trade."

It is significant to note, however, that the trial court made no finding that a special custom of the trade existed whereby the phrase "subject to confirmation" denotes a standard confirmation of sale form. Crane himself denied that such phrase necessarily held such meaning. [Tr. p. 214.] The rules of trade definitions promulgated by the Secretary of Agriculture which appear on the standard confirmation of sale form clearly indicate that the phrase is strictly a means of informing the person receiving the offer, that the seller has the opportunity of confirming or

rejecting the sale. The meaning which Crane's testimony sought to establish is inherently foreign to the trade meaning recognized by the Secretary of Agriculture's standard rules.

It is firmly established that evidence of an undisclosed intention of parties to a contract is inadmissible. The Supreme Court of California in *Brant v. California Dairies, Inc.*, 4 Cal. 2d 128, 133, 48 P. 2d 13, said:

> "Other statements of similar character were admitted. Together they amount to nothing more than a statement of what Carver personally believed the agreement of the parties to be. But it is now a settled principle of the law of contract that *the undisclosed intentions of the parties are, in the absence of mistake, fraud, etc., immaterial;* and that the outward manifestation or expression of assent is controlling. This is the 'objective' standard established by the modern decisions and approved by authoritative writers. (Citing cases and authorities) * * * In construing a contract, the question whether an uncertainty or ambiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal. * * * No showing of mistake is made here; and *a fair reading of the correspondence discloses the terms of the agreement without uncertainty. The testimony of Carver as to his intention is in direct conflict with the plain meaning of the writings constituting the contract, and was therefore incompetent and inadmissible under the parol evidence rule."* (Emphasis supplied.)

VI.

Even if There Had Been Credible Evidence to Support the District Judge's Findings That Crane Intended That the Phrases "Subject to Confirmation" and "Part Payment With Confirmation" Require the Use of a Standard Confirmation of Sale, Such an Undisclosed Intention Would Not Affect the Validity of a Contract Otherwise Valid.

It must be noted that the District Court did not find that anyone other than Crane himself, attributed any special and unusual meaning to the phrases, "subject to confirmation" and "part payment with confirmation."

> "An undisclosed mental attitude can never constitute the basis of a contractual obligation."
>
> *Gulart v. Azevedo,* 62 Cal. App. 108, 216 Pac. 405.
>
> "Courts will not in deriving one's intention, be controlled by an unexpressed state of mind."
>
> *Canavan v. College of Osteopathic Physicians,* 73 Cal. App. 2d 511, 166 P. 2d 878.

Thus, *Section 20* of the *Restatement of the Law of Contracts* by the American Law Institute, specifies that *manifested mutual* assent rather than *actual mental assent* is the essential element in the formation of a contract.

If Crane, in his telegram of September 26, 1944, intended a meaning other than the usual and plain meaning of the language used, as author of such telegram, it was his duty to make such special intention clear to the recipient thereof.

A letter containing terms of a contract is to be construed most strongly against the party who drafted it.

> *California Civil Code,* Sec. 1654;
>
> *Crillo v. Curtola,* 91 Cal. App. 2d 263, 204 P. 2d 941;

Steelduct Co. v. Henger-Seltzer Co., 50 Cal. App. 2d 475, 123 P. 2d 100.

Where a contract is evidence by correspondence, a letter is construed most strongly against the writer.

Star-Chronicle Publishing Co. v. N. Y. Evening Post (C. C. A. 2), 256 Fed. 435.

A letter, to be relied upon as the basis of a promise, must be given such meaning as it would reasonably have to the addressee.

Williams v. Sawyer Bros. (C. C. A. 2), 45 F. 2d 700.

VII.

There Is No Evidence in the Record to Support the Trial Court's Conclusion That the Telegrams Sent by Crane to Margules Required That Any Contract Entered Into Should Be Confirmed in Writing by the Parties to the Proposed Contract and in Particular, Kazanjian.

Conclusion No. 1 of the District Court is to the effect that the telegrams which Crane sent to Margules required that there be written confirmation from all of the parties to the proposed sale, and particularly by Kazanjian. [Tr. p. 81.] There were no findings of fact to support such conclusion. The telegrams from Crane to Margules speak for themselves. These telegrams are part of the findings of fact. The telegrams and teletype messages from Crane to Margules prior to confirmation of the sale consist of items 1, 3, 4, 6 and 8 of the appendix to this brief. We search such documents in vain for evidence of any such requirement. It is simply a case of the District Court rendering a conclusion of law sans fact findings or evidence in support thereof.

VIII.

There Is No Evidence to Support the Conclusion of the Trial Court That Kazanjian Never Accepted the Terms Proposed by Margules.

As part of conclusion No. 2, the District Court held that Kazanjian never accepted the terms proposed by Margules. [Tr. p. 82.] Prior to confirmation of the sale by Crane and Kazanjian, the communications from Margules to Crane consisted of items 2, 5, 7 and 10 which appear in the appendix to this brief. We search such documents in vain for a proposal of any terms by Margules. We find only acceptance by Margules in behalf of appellants of terms offered by Kazanjian through Crane. Here again the District Court by its conclusion of law attempted to read something into the contract which is not there.

IX.

There Was No Evidence to Support the Conclusion of the Trial Court That the Terms Proposed by Kazanjian in His Telegram to Crane of October 4th Were Never Accepted by Margules or Appellants.

As part of its conclusion No. 2, the District Court held that neither Margules nor appellants had acepted the terms proposed by Kazanjian to Crane in his telegram of October 4, 1944. [Tr. p. 82.] It was contended by Kazanjian in the trial of this case, that this telegram was not a confirmation or a ratification of an oral confirmation, but was an offering of new terms and conditions. The very fact that the telegram commences with the words "15 cars storage U. S. One Emperors December 10th conversion satisfactory at $2.50 etc." indicates a confirmation and an acceptance of the terms stated

rather than an offering of new terms. If otherwise, Kazanjian would more logically have said: "Previous terms unsatisfactory. Will sell only on the following terms, etc."

The terms mentioned in such telegram of October 4 are substantially identical to the terms confirmed by Crane and Margules. With reference to such telegram, Crane was asked, "Was there anything in that telegram that indicated to you that Mr. Kazanjian was quoting terms different from or other than those terms which he had authorized you to confirm to the Southwest Brokerage Company"? Crane's unequivocal answer was, "They were the same terms that we offered to the Southwest Brokerage Company." [Tr. p. 310.]

It is interesting to note that the trial judge did not undertake to make any finding of fact which might indicate wherein the terms described in Kazanjian's telegram of October 4 differed in any respect from the terms specified in the telegram and teletype messages exchanged between Crane and Margules or in the Standard Memorandum of Sale which was transmitted to appellants and Crane by Margules.

On cross-examination, Kazanjian was requested to point out wherein his telegram of October 4th to Crane consisted of different terms, and wherein he designated that the terms under which Crane had sold for Kazanjian's account were not satisfactory to Kazanjian. The answer was never received because the court sustained an objec-

tion to the question upon the ground that the question was argumentative. [Tr. p. 186.]

Reading Crane's telegram to Kazanjian of October 3, 1944, and Kazanjian's reply to Crane by telegram of October 4, 1944, it is apparent that both such individuals were expressing agreement, and were making reference to the terms upon which they had agreed in a telephone conversation that preceded such telegrams.

The fact that Kazanjian did not use the identical language used by Crane is unimportant. It was clearly the intention of the telegram of October 4th to confirm as satisfactory the notification that Crane had given to Kazanjian on October 3 that he had sold the grapes for Kazanjian's account on the terms therein outlined.

> "It is not essential to the acceptance of defendant's proposal that plaintiff should use the same identical language used in the proposal. Any form of expression showing clearly an intention to accept on the terms proposed or to consent to the same subject-matter in the same sense is sufficient if coupled with no new conditions." *Ennis Brown Co. v. W. S. Hurst Co.,* 1 Cal. App. 752 (third syllabus), 82 Pac. 1056.

Evidence of agreement could not be any clearer.

X.

The Statute of Frauds of California Is Inapplicable to an Action Brought for Damages Under the Perishable Agricultural Commodities Act.

The District Court held that since there was no written evidence of authority from appellants to either Margules or Crane as brokers, the contract was unenforceable under California law. [Tr. p. 82.]

The pertinent provisions of the California Statute of Frauds read as follows:

Civil Code, Section 2309:

> "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Civil Code, Section 2310:

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof."

Civil Code, Section 1624a:

> "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receives the same, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. * * *"

Section 1624a of the *Civil Code* is in language identical to *Section 4* of the *Uniform Sales Act.* The Statute of Frauds of the State of Pennsylvania which was involved in the case of *Rothenberg v. H. Rothstein & Sons* (C. C. A. 3), 183 F. 2d 524, is also of identical language. The *Rothenberg* case considered the question as to whether a procedural statute of frauds, such as common to California and Pennsylvania, was a bar to enforceability of an action brought under the Perishable Agricultural Commodities Act.

The California courts have uniformly held that the California statute of frauds is a procedural statute.

> *Dessert Seed Co. v. Garbus,* 66 Cal. App. 2d 838, 844, 153 P. 2d 184;
>
> *Producers Fruit Co. v. Goddard,* 75 Cal. App. 737, 755, 243 Pac. 686;
>
> *Levi v. Murrell* (C. C. A. 9), 63 F. 2d 670, 671.

In *Rothenberg v. H. Rothstein and Sons, supra,* the Court of Appeals for the Third Circuit points out that jurisdiction in this type of case is not based upon diversity of citizenship, but upon a federal remedy. It therefore holds that in the case of a contract which may have been unenforceable under the Pennsylvania Statute of Frauds, the maintenance of a reparation proceeding under the Perishable Agricultural Commodities Act before the Secretary of Agriculture and thereafter in the District Court is not precluded.

XI.

The Absence of a Written Memorandum Signed by Appellants and the Absence of Written Authority to Appellants' Broker Was No Bar to Recovery Herein as the Statute of Frauds Is Concerned Only With the "Party to Be Charged."

Because the case of *Rothenberg v. H. Rothstein, supra,* appears completely determinative of the issue of the Statute of Frauds, we shall be most brief in pointing out, that, irrespective of such decision, the California Statute of Frauds is concerned only with *the party to be charged,* the defendant in the proceeding.

In the case of *Cowan v. Tremble,* 111 Cal. App. 458, 462, 296 Pac. 91, the court said:

> "Moreover, contracts within the statute of frauds *need be subscribed only by the party to be charged or his agent* (Civ. Code, sec. 1624), and may be enforced notwithstanding they are not signed by the plaintiff or his authorized agent. (Cavanaugh v. Casselman, 88 Cal. 543 (26 Pac. 515); Scott v. Glenn, 98 Cal. 168 (32 Pac. 983.) *Nor does this rule render the contract liable to the objection of a lack of mutuality, for by bringing the suit the plaintiff binds himself to abide by the judgment of the court.* (Harper v. Goldschmidt, 156 Cal. 245 (134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451); Allen v. Dailey, 92 Cal. App. 308 (268 Pac. 404); Williston on Contracts, sec. 140, p. 314.)" (Emphasis supplied.)

See also *Steel v. Duntley,* 115 Cal. App. 451, 452, 1 P. 2d 999, where the court said:

> "The statute of frauds does not require the signature of any party other than the one to be charged. Following an oral contract * * * defendant and

plaintiff signed separate escrow instructions, the defendant signing personally, the plaintiff by her nephew, who had acted as her agent throughout the deal. It is of no consequence that the nephew had no written authorization to act as plaintiff's agent. These escrow instructions * * * constitute a written contract subscribed by the party to be charged, *i. e.*, the defendant."

See also:

18 *Cal. Jur.* p. 917, Sec. 86.

It should be noted also that the agency between appellants and Margules as broker *was created within the State of Texas where there is no statute of frauds requiring the broker's authority in this type of suit to be in writing.*

XII.

The District Court's Finding That Crane Made No False Representation Is Irreconcilable With Its Conclusion That Kazanjian Had Not Confirmed the Sale.

By Finding No. X the District Court found that the statements and representations made by Crane were neither false nor fraudulent. [Tr. p. 81.] This finding was made despite Finding No. IV which found that on October 2, 1944, Crane sent a night letter to Margules stating that he had secured confirmation from Kazanjian. [Tr. p. 75.]

Falsity and untruth are synonymous.

The word "false" is defined in Webster's International Dictionary (Second Edition) as meaning: "Not according with truth or reality; not true; erroneous; incorrect; as, a *false* statement."

We do not, of course, agree with the District Court's ruling that Kazanjian had not confirmed the sale. But

assuming for the sake of argument that there was evidence to support such conclusion, it is incomprehensible how the trial court could also hold that Crane was not making a false statement when he reported to Margules that he had received Kazanjian's confirmation.

The significance of the finding was this: If Crane had falsely represented such fact to Margules, Crane would be liable to appellants for violation of *7 U. S. C. A.,* Section 499b(4), which declares that it is unlawful "for any * * * broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction" in interstate commerce, or "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction."

Section *499f of 7 U. S. C. A.* affords reparation damages for violation of Section *499b.*

Obviously the misrepresentation of confirmation (if it were a misrepresentation) constituted a fraud upon appellants. It was admittedly made with intent that appellants rely thereon. [Tr. p. 446.] If, as Crane contended, the Standard Memorandum of Sale which Margules sent him on October 3rd was not the form he intended to be used, he was under a duty under *Section 499b* to so notify Margules and request the form of confirmation he did expect.

Finding No. X represents an effort by the District Judge to absolve both appellees of liability in a case where, if one is not liable, it inevitably follows that the other is liable. To accomplish such absolution, the District Judge was compelled to indulge in the absurdity that a false statement is not a false statement.

XIII.

The Contract Was Not in Violation of the Emergency Price Control Act.

The District Judge found that the maximum ceiling price for grapes had been exceeded by the agreement of appellants to pay a $50.00 per car procurement commission to Crane for procurement services. [Tr. p. 80.] He did not render a conclusion of law thereon. In his memorandum opinion, the District Judge declared that he did not think such finding was necessary for his decision but if he is reversed by the higher courts he would then hold the contract was in violation of the price regulations.

This court recently decided this precise question in the case of *Joseph Denunzio Fruit Co. v. Crane,* 188 F. 2d 569 (rehearing denied), holding that the same terms as herein involved did not constitute a violation of the price control act. It would be superfluous to argue the point further.

XIV.

The Fact That on October 24, 1944, Appellants Contracted to Purchase Some Replacement Grapes Does Not Alter the Measure of Damages as Being Based Upon the Value of Grapes on December 10, 1944, the Date for Delivery Specified by the Contract.

Here again, although unnecessary to his decision, the District Judge was anxious to notify counsel what he would do in the event of reversal by the appellate court. [Tr. pp. 258, 259.] He therefore found that on October 24, 1944, appellants, having been informed that Kazanjian would not ship the grapes, "commenced to purchase"

replacement grapes. [Tr. p. 79.] He also found that the reasonable market value of U. S. No. 1 Emperor grapes between *October 10, 1944, to and including November 15, 1944,* was $3.25 per lug. [Tr. p. 79.] As a conclusion of law, the trial judge held that complainants acquiesced in the repudiation on October 24th by contracting to purchase replacement grapes. [Tr. p. 82.]

While we can point out that Crane as Kazanjian's agent [Tr. p. 289] notified Margules that *Kazanjian turned down $3.40 per lug* for his entire stock of *uninspected grapes* on October 12, 1944 [Tr. p. 476], the market value of Emperor grapes as to the dates mentioned is immaterial. *The significant date is the date of delivery under the contract, i. e., December 10, 1944.* The District Court made no finding as to the December 10th value of Emperor grapes U. S. No. 1 quality certified by government inspection. The finding of the Secretary of Agriculture that the market value of such grapes on December 10th was $4.00 per lug is therefore presumptively correct. [Tr. p. 61.] (*7 U. S. C. A.,* Sec. 499g(c).)

The contention that the purchase of some replacement grapes on October 24th constitutes an acquiescence in the repudiation, stands in interesting contrast to the contention of Crane in the case of *Denunzio v. Crane, et al.,* 79 Fed. Supp. 117 (see page 130), for in that case counsel for Crane affirmatively contended that "when we (Crane and/or Kazanjian) notified them (Rains and/or Denunzio) that there would be no performance of this contract, it was his duty (Rains and/or Denunzio) to go out and secure grapes and he had no business waiting until December 10 (1944) before he secured them."

If the making of replacement purchases to minimize damages constitutes an acquiescence in the breach, then

appellees contend that when a party to a contract is advised of repudiation by the other party, he is under *a duty to acquiesce* in the repudiation.

The California rule on the proper measure of damage, as expressed in *U. S. Trading Corp. v. Newmark,* 56 Cal. App. 176, 191, is:

> "In measuring damages, the rule is that if, before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach."

As the late Judge O'Connor pointed out at page 130 of his decision in the *Denunzio* case, the buyer "was not obliged to anticipate at his peril, that the cost of grapes would be less prior to December 10, 1944."

In *Compania Engraw etc. v. Schenley Distilleries Corp.,* 181 F. 2d 876, this court declared the California law to be that in the absence of actual acquiescence in the repudiation, the date of contractual delivery and not the date of repudiation governs the measure of damages.

In purchasing available grapes for replacement purposes, appellants were not acquiescing in the repudiation. As the Secretary of Agriculture found, "the evidence shows that complainants were diligent in their efforts to replace the 10 carloads of grapes after receiving notice that the grapes would not be stored or shipped." [Tr. p. 60.] The Secretary determined damages by the difference between the contract price and the cost of replacement purchases as to replaced grapes, and the difference between the contract price and the market price on December 10, 1944 (date of delivery under the contract), on unreplaced

grapes. [Tr. pp. 60-62.] This, in our opinion, represents the "loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract" in accordance with subdivision (2) of Section 1787 of the California Civil Code (Uniform Sales Act, Sec. 67(2)).

Conclusion.

Essentially the instant case is a simple one. After Kazanjian obligated himself to sell ten cars of grapes to appellants at the O.P.A. ceiling price of the grapes, the O.P.A. ceiling was lifted, and the price of grapes went up. Kazanjian then attempted to obtain a higher price from appellants than contracted for. Appellants stood on their bargain.

The barrage of defenses which appellees fired upon appellants' case represents the desperate effort of Kazanjian as a defaulting party to escape the consequences of his breach. Originally the explanation for the breach was the frustration of contract by the lifting of the ceiling price. No other defense was mentioned in the correspondence of the parties. When the case reached the Secretary of Agriculture, appellees were apparently convinced that the frustration theory would not hold. It was promptly abandoned, and the defense was then centered upon the statute of frauds and an absence of a contract. By the time this case had reached the District Court, a further defense was developed to the effect that the contract was illegal by reason of an alleged violation of price ceiling regulations. During the course of the trial *de novo* in the District Court, still a further defense was

added, namely, that the contract called for a particular form of confirmatory document which had never been executed.

The reasonableness of these defenses is unalterably destroyed by inconsistent and contradictory testimony of appellees themselves, and the obvious origin of the defenses as "afterthoughts." Kazanjian refused to fulfill his contract to sell the grapes because the market price of grapes had risen. It is not uncommon for a person in such a position to ascribe multitudinous reasons for a breach of contract, particularly, the assertion that there was no contract.

In the language of this court in the case of *Compania Engraw etc. v. Schenley Distillers Corp.*, 181 F. 2d 876, at page 878:

> "For experience teaches that seldom is a defrauding party inarticulate in the assertion of some plausible reason for default. *And the most common of these excuses is that there was no contract at all!*" (Emphasis supplied.)

The decision of the District Court enables the seller to escape his liability under a contract which clearly and unmistakably committed him to the sale of the grapes in question. It clothes the obviously shameful defenses of the defendant with judicial dignity. The decision is a serious threat to the maintenance of confidence in the sanctity of contracts. The business world depends upon the integrity of contracts. Without such assurance commerce cannot long endure. It is essential that courts zealously pro-

tect that integrity. In the words of Chief Justice Taney in the case of *Gibson v. Stevens* decided by the United States Supreme Court in 1850, 49 U. S. 384, 397:

> "For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader."

Respectfully submitted,

Harry A. Pines,
J. Manuel Hoppenstein,
Adele Walsh,

Attorneys for Appellants.

APPENDIX.

Chronological Résumé of Written, Telegraphic and Teletype Exchanges Between Parties.

(Code words are translated.)

1. September 26, 1944. CRANE to MARGULES. Telegraphic night letter to various brokers including Margules (Southwest Brokerage Company of Dallas, Texas) as follows:

> "Can book Emperors—nine cars U S One and nine cars unclassified or 18 cars—Vineyard run grade—to go into storage—Packing to commence rate of one or two daily October 9th—We to personally inspect AFOHD [F.O.B. acceptance final] basis our inspection—Shipper to transfer title on or after December 10th he paying all storage charges. Packed 28# net—Display new lugs lidded—Calripe or comparable brand—$500 part payment with confirmation—price 2.53 net to shipper which ceiling that time—we charging 50.00 per car procurement charge—ADLAM [offered subject to confirmation] CORLU [wire immediately, must have answer] Thursday. ADLAS [offer subject to confirmation shipping point] immediate UPTMU [tomatoes 6 x 6 and larger]—New Crop Edson District—ALBIQ [approximately 85%] 3.25—Can secure 3-4 cars uninspected account [because of] heavy puff heavy sidewalls. Would grade AIBIEIQ [approximately 80-85%] except for puff which is not a serious defect account of heavy sidewall 2.50." [Tr. p. 450.]

2. September 27, 1944. MARGULES to CRANE. Teletype message, as follows:

"Referring quotation on nine cars U S One and nine unclassified Emperors—do we have to buy all of them or can we get someone buy possible couple of each. Go ahead." [Tr. p. 421.]

3. September 27, 1944. CRANE to MARGULES. Teletype message as follows:

"Believe we could work a deal on block of two-three each. Submit it and will see if can work out." [Tr. p. 421.]

4. October 2, 1944. CRANE to MARGULES (and various other brokers). Telegram as follows:

"CPFGP [referring to our night letter of 26th] quoting future Emperors—secured revised deal—fifteen cars U S One 2.50 net—same deal—CORSD [wire quick if wanted] any part." [Tr. p. 451.]

5. October 2, 1944. MARGULES to CRANE. Teletype message as follows:

"Referring that 6 Emperors Ft Worth and 4 Dallas—deal okay—2.50 net—50.00 for you if legal. Advise. Go ahead." [Tr. p. 475.]

6. Same day. CRANE to MARGULES. Teletype message as follows:

"Haven't been able contact the shipper yet but sure its okay. Will wire you definitely one way or other soon as get him. Yes, it is legal—naturally a receiver can pay his whole markup for buying brokerage if he wants to—will wire you soon as receive definite confirmation. Understand its basis 1,000.00

deposit against each U S One inspection as they are loaded. What else new. Go ahead." [Tr. pp. 475, 476.]

7. Same day. MARGULES to CRANE. Teletype message as follows:

"Far as I know that covers it. Try wire night—sure this end. O K. End." [Tr. p. 476.]

8. Same day. CRANE to MARGULES. Telegraphic night letter as follows:

"Secured Redlyon Packing Company confirmation ten cars grapes as outlined. You collect deposits to be forwarded to us soons Dupja [government inspection] wired each car." [Tr. p. 25.]

9. October 3, 1944. CRANE to MARGULES. Teletype message as follows:

"Did you sell entire ten cars Emperors? Corey others waiting. Do Aflep tomatoes 30906? First car arrived Kaysee today reported beautiful quality." [Tr. p. 474.]

10. Same day. MARGULES to CRANE. Teletype message as follows:

"What are U talking about? We ordered and U already confirmed by wire 10 cars Emperors advise. Unarrived Toms 30906 sell elsewhere if U desire." [Tr. p. 475.]

11. Same day. CRANE to KAZANJIAN (Red Lion Packing). Telegram as follows:

"Referring telephone have sold for your account basis 2.50 lug net to you block Emperors mentioned—five cars basis 750.00 car deposit—ten cars basis 1000.00

deposit—to be paid upon receipt US ONE Government inspections—now depending you handle through us balance cars you mentioned for fresh shipment—advise when expect ship these—believe we could place them now—ceiling PRICDXXX price with deposits—selling basis ability make US ONE grade—suggest give us approximate shipping dates—mays well get cleaned up since ceiling precludes any possibility higher market time of shipment—will forward confirmations for your signature soons receive airmail from buyers." [Tr. p. 453.]

12. Same day. MARGULES to CRANE, CENTRAL FRUIT & VEGETABLE CO. of Dallas, Texas, and WEST TEXAS PRODUCE CO. of Ft. Worth, Texas. Standard Memorandum of Sale signed by MARGULES as Broker.

This document refers to sales to West Texas Produce Co. of 6 cars and to Central Fruit & Produce of 4 cars for the account of "(Seller) Associated Fruit Dist. of Los Angeles, Calif. (a/c Red Lion Pkg. Co.)"; recites: "sale made f.o.b. acceptance final"; recites: "Terms draft West Texas thru First Nat'l Bank, Ft. Worth * * *, draft Central Fruit thru Mercantile Bank, Dallas"; and further recites: "Quality Commodity and Specifications Price ten (10) cars government inspected U. S. #1 Emperor grapes 28# net @ 2.50 f.o.b. plus 50.00 buying service for Associated, plus our brokerage 3½ lug. (To go into storage, packing to commence rate of one or two daily starting about October 9th. Shipper to transfer title on or after December 10th, Shipper pays all storage charges. New lidded display lugs, 'Calripe,' or comparable brand, partial

payment 1000.00 per car to be made by buyers with government inspection report each car.)" [Tr. pp. 27, 28.]

13. October 4, 1944. KAZANJIAN to CRANE. Telegram as follows:

"Fifteen cars storage U. S. One Emperors December Tenth conversion satisfactory at two dollars and fifty cents FOB Exeter guaranty by buyer. One thousand dollars deposit on 10 cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point. You to arrange for storage as agreed. Balance of pack intend to load after Oct. twentieth will be glad to make deal on same about the 15th of Oct." [Tr. p. 454.]

14. October 10, 1944. MARGULES to CRANE. Telegram as follows:

"Understand ceiling lifted table grapes, whats to prevent shipping some these ten cars instead putting all in storage. Advise. *Re* tomatoes twos Aceankist Biltmore sold track 2.00 delivered various shippers rolling sale arrival. Will AFLEP anything which arrives here." [Tr. p. 481.]

15. Same day. CRANE to MARGULES. Telegram as follows:

"Shipper Redlion takes view account ceiling lifted any contracts Emperors voided. Willing go along give your trade preference shipping as packed at market price which today 3.25. AFOHD [f.o.b. acceptance final] Advise." [Tr. p. 481.]

16. Same day. MARGULES to J. W. CURRY, WAR FOOD ADMINISTRATION REGULATORY DIVISION, WASH., D. C. Telegraphic night letter as follows:

> "Contract made ten days ago with California shipper as agent for another party for ten cars Emperor grapes at 2.50 FOB packing starting October 10th shipment from storage California starting December 9th. Table grape regulation lifted today. Shipper states other party considers contract void. Willing to ship basis now 3.25 FOB. Appreciate advise your ideas morning as to status of contract." [Tr. p. 482.]

17. October 11, 1944. T. C. CURRY, WAR FOOD ADMINISTRATOR TO MARGULES. Telegram as follows:

> "Retel. Based on facts presented would appear California shipper obligated deliver ten Emperors 2.50 FOB. Don't see where lifting OPA ceiling has any effect on contract this kind. If can assist further advise." [Tr. p. 479.]

18. Same day. MARGULES to CRANE. Telegram as follows:

> "Answering Curry, War Food Administration, says lifting OPA ceiling has not effect on this contract. Better advise Red Lion accordingly today. Get definite answer yes or no whether going ship per contract now or later so buyer also ourselves know how to handle advise." [Tr. p. 480.]

19. Same day. CRANE to MARGULES. Teletype message.

> "Please call us collect 10 a. m. our time tomorrow Tucker 3839 regarding Emperor deal." [Tr. p. 478.]

20. October 12, 1944. CRANE to MARGULES. Telegraphic night letter.

"As final gesture and endeavoring to amicably settle grape contract Red Lion Packing Company willing sell Basis 3.00 net FOB quantities specified on contract. Buyer to pay us .10 pkge procurement. Quality is nice uninspected field run but Red Lion states in all probability fruit easily grade U. S. One arrival, but not willing make this guarantee. Our inspector has seen fruit. Says really beautiful. If buyers wish we will arrange to put cars storage which we have already under contract. Otherwise Red Lion takes attitude that after all he had nothing to do with ceiling. Feels he relieved all moral responsibility by making this offer. Claims turning down offers his entire outfit today basis 3.40 cash FOB." [Tr. p. 476.]

21. October 13, 1944. MARGULES to KAZANJIAN. Telegraphic night letter.

"Re ten cars Emperors confirmed by you thru Associated for West Texas Produce and Central Fruit, we wiring Associated tonite offer of 3.00 FOB plus 10¢ procurement charge unacceptable and buyers want contract fulfilled as confirmed. If not going thru on this basis please so advise immediately by wire as buyers desire take action protect their interests. Personally don't see how lifting ceiling has any thing to do with contract which was made at definite price and Washington has wired us to this effect also. Advise promptly direct or thru Associated. Thanks." [Tr. p. 477.]

22. Same day. MARGULES to CRANE. Telegraphic night letter.

> "Tomatoes really shot 1.25 to 2.00 delivered. Unarrived fars I know 18378 but really believe you do better elsewhere. Will AFLEP if any received 18378. Regarding 10 car Emperor deal West Texas and Central say offer per your wire unacceptable. Want definite yes or no by tomorrow if contract not going to be filled by responsible party so can take whatever action they deem proper." [Tr. p. 479.]

23. October 16, 1944. CRANE to MARGULES. Teletype message as follows:

> "Again talked Redlion. They state definitely unwilling abide any sales made where ceiling definite consideration. Furthermore crop short. Not packing U. S. One grade. Duquk case for courts decide since ceiling taken off unexpectedly. Nobody knows whether or not such deal enforceable. Offer suggestion you take whatever action deem advisable." [Tr. p. 482.]

No. 12713

United States Court of Appeals

for the Ninth Circuit.

HENRY JOHNSON,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court, Northern District of California, Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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United States District Court for the Northern District of California, Southern Division

No. 28995G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY JOHNSON,

Defendant.

COMPLAINT FOR INJUNCTION, RESTITUTION AND TREBLE DAMAGES

Count I.

1. In the judgment of the Housing Expediter, the defendant has engaged in acts and practices which constitute violations of Section 4 of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. Appendix Section 904).

2. Jurisdiction of this action is conferred upon this Court by Sections 1(b), 205(a) and 205(c) of said Emergency Price Control Act of 1942, as amended.

3. At all times mentioned herein defendant was the landlord of and rented certain controlled housing accommodations located within the San Francisco Bay Defense-Rental Area described as 1493, 1495 and 1497 O'Farrell Street, San Francisco, California.

4. Prior to July 1, 1947, there has been in full force and effect pursuant to said Emergency Price

Control Act of 1942, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in paragraph 3 of Count I above are located.

5. Prior to July 1, 1947, defendant demanded, accepted or received from tenant occupying the premises described in paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in items 1(a) to 1(g), inclusive, of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Prior to July 1, 1947, defendant demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises, rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count II.

1. Plaintiff incorporates herein by reference the allegations in paragraph 3 of Count I of his Complaint herein.

2. In the judgment of the Housing Expediter, the defendant has engaged in acts and practices which constitute volation of Section 206(a) of the Housing and Rent Act of 1947, as amended (Public Law 31, 81st Congress, 1st Session).

3. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

4. Since July 1, 1947, there has been in full force and effect pursuant to said Housing and Rent Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in paragraph 3 of Count 1 above are located.

5. Since July 1, 1947, defendant demanded, accepted or received from tenant occupying the premises described in paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in items 2(a) to 2(l), inclusive, of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Since July 1, 1947, defendant demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count III.

1. Plaintiff incorporates herein by reference the allegations in paragraph 3 of Count I and paragraph 4 of Count II of his Complaint herein.

2. Jurisdiction of this action is conferred upon this Court by Sections 205 and 206(c) of said Housing and Rent Act of 1947, as amended.

3. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) days period immediately prior to the date of the commencement of this action) to wit: between July 1, 1948, and June 3, 1949, defendant demanded, accepted or received from tenant occupying the premises described in paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations as appears more fully in items 3(a) to 3(h), inclusive, of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

4. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) days period immediately prior to the date of the commencement of this action) defendant has demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

5. More than thirty (30) days have elapsed since the occurrence of the violations hereinabove mentioned, and the persons from whom such excess rental payments were demanded, accepted or re-

ceived have not instituted any action under Section 205 of the Housing and Rent Act of 1947, as amended, for said violations.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendant, his attorneys, agents, servants, and employees and all other persons in active concert or participation with the defendant from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended, or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendant be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts in excess of the lawful maximum rents which have been or may be demanded, accepted or received by the defendant from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore mentioned; or, in the alternative, that the defendant be ordered and directed to pay the amounts in excess of the lawful maximum rents as hereinabove prayed, to the Treasurer of the United States.

3. That judgment for the Plaintiff be granted herein for Three Thousand Five Hundred and Sixteen Dollars ($3,516.00), being three times the amount by which the rents demanded, accepted or received by defendant within one year prior to the date of the commencement of this action (excluding, however, the thirty (30) days immediately prior to the date of the commencement of this action) exceeded the legal maximum rent; provided, however, that in the event this Court requires the defendant to make refunds as prayed for, the amount sought in judgment in this paragraph be diminished by that amount of such refund ordered by the Court and demanded, accepted or received from the tenant by the defendant within the one-year period above stated.

4. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded, which the Court may find necessary to effectuate the purposes of the said Act as now existing, or hereafter amended or superseded, and of any orders or regulations issued thereunder.

5. That Plaintiff recover the costs of this action.

Dated this 28th day of June, 1949.

/s/ SIDNEY FEINBERG,
Attorney, Office of the
Housing Expediter.

EXHIBIT A

Schedule

Landlord: Henry Johnson
1497 O'Farrell Street,
San Francisco, California

Item	Tenant	Unit San Francisco, California	Date Rented From	To	Rent Collected	Maximum Legal Rent	No. of Overcharges	Amt. of Each Overcharge	
1(a)	Wilbert Guydon	Rm. #2, 1493 O'Farrell St.	10/11/46	3/ 2/47	$ 7.50 per wk.	$ 6.00 per wk.	20	$ 1.50	$ 30.00
1(b)	Wilbert Guydon	Rm. #2, 1493 O'Farrell St.	3/ 2/47	6/30/47	*7.50 per wk.	6.00 per wk.	17	1.50	25.50
1(c)	Riley Samuel	Rm. #4, 1493 O'Farrell St.	6/ 2/47	6/30/47	32.00 per mo.	24.00 per mo.	1	8.00	8.00
1(d)	Mrs. Tillie Robinson	Rm. #4, 1945 O'Farrell St.	10/ 1/46	11/ 1/46	40.00 per mo.	32.00 per mo.	1	8.00	32.00
1(e)	Mrs. Tillie Robinson	Rm. #4, 1945 O'Farrell St.	11/ 1/46	12/31/46	7.00 per wk.	4.50 per wk.	9	2.50	22.50
1(f)	Mrs. Tillie Robinson	Rm. #4, 1945 O'Farrell St.	1/ 1/47	6/15/47	8.00 per wk.	4.50 per wk.	23	3.50	80.50
1(g)	Pauline Henderson	Rm. #1, 1495 O'Farrell St.	10/ 7/46	6/30/47	10.00 per wk.	5.50 per wk.	39	4.50	175.50
2(a)	Wilbert Guydon	Rm. #2, 1493 O'Farrell St.	3/ 2/47	6/18/49	8.00 per wk.	6.00 per wk.	119	2.00	238.00
2(b)	Riley Samuel	Rm. #4, 1493 O'Farrell St.	7/ 1/47	6/15/49	32.00 per mo.	24.00 per mo.	25	8.00	200.00
2(c)	Robert Castle	Rm. #6, 1493 O'Farrell St.	2/18/49	6/24/49	10.00 per wk.	6.00 per wk.	18	4.00	72.00
2(d)	Pauline Henderson	Rm. #1, 1495 O'Farrell St.	7/ 1/47	12/15/47	10.00 per wk.	5.50 per wk.	25	4.50	112.50
2(e)	Pauline Henderson	Rm. #1, 1495 O'Farrell St.	12/15/47	2/14/49	8.00 per wk.	5.50 per wk.	112	2.50	290.00
2(f)	Lester Houston	Rm. #2, 1495 O'Farrell St.	8/ 8/47	4/ 4/48	40.00 per mo.	12.00 per mo.	8	28.00	224.00
2(g)	Lester Houston	Rm. #2, 1495 O'Farrell St.	8/20/48	5/ 7/49	40.00 per mo.	12.00 per mo.	8	28.00	224.00
	(Note: Tenant moved on 4/4/48 from the building and returned to same room, No. 2, on 8/20/48.)								
2(h)	Leslie Houston	Rm. #3, 1495 O'Farrell St.	9/ 3/47	5/ 7/49	10.00 per wk.	5.00 per wk.	88	5.00	440.00
2(i)	Tillie Robinson	Rm. #5, 1495 O'Farrell St.	11/ 1/47	3/ 1/48	7.00 per wk.	4.50 per wk.	17	2.50	42.50
2(j)	Tillie Robinson	Rm. #4, 1495 O'Farrell St.	3/ 1/48	4/ 1/48	40.00 per mo.	8.00 per mo.	1	32.00	32.00
2(k)	Tillie Robinson	Rm. #4, 1495 O'Farrell St.	4/ 1/48	7/ 1/49	32.00 per mo.	8.00 per mo.	15	24.00	360.00
2(l)	Willie Williams	Rm. #7, 1495 O'Farrell St.	8/13/48	6/17/49	8.00 per wk.	5.50 per wk.	44	2.50	110.00
3(a)	Wilbert Guydon	Rm. #2, 1493 O'Farrell St.	7/ 1/48	6/ 2/49	8.00 per wk.	6.00 per wk.	48	2.00	96.00
3(b)	Riley Samuel	Rm. #4, 1493 O'Farrell St.	7/ 1/48	6/ 2/49	32.00 per mo.	24.00 per mo.	11	8.00	88.00
3(c)	Robert Castle	Rm. #6, 1493 O'Farrell St.	2/18/49	6/ 2/49	10.00 per wk.	6.00 per wk.	15	4.00	60.00
3(d)	Pauline Henderson	Rm. #1, 1495 O'Farrell St.	7/ 1/48	5/15/49	8.00 per wk.	5.50 per wk.	45	2.50	112.50
3(e)	Lester Houston	Rm. #2, 1495 O'Farrell St.	8/20/48	5/ 7/49	40.00 per mo.	12.00 per mo.	8	28.00	224.00
3(f)	Leslie Houston	Rm. #3, 1495 O'Farrell St.	7/ 1/48	5/ 7/49	10.00 per wk.	5.00 per wk.	44	5.00	220.00
3(g)	Tillie Robinson	Rm. #5, 1495 O'Farrell St.	7/ 1/48	6/ 1/49	32.00 per mo.	8.00 per mo.	11	24.00	264.00
3(h)	Willie Williams	Rm. #7, 1495 O'Farrell St.	8/15/48	6/ 3/49	8.00 per wk.	5.50 per wk.	42	2.50	107.50

* $8.00 per week—penciled in.

[Endorsed]: Filed July 7, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and, answering the Complaint of the plaintiff herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations set forth in Paragraphs 2, 3 and 4 of Count I.

II.

Denies, generally and specifically, each and every allegation set forth in Paragraphs 1, 5 and 6 of Count I.

III.

Admits the allegations set forth in Paragraphs 1, 3 and 4 of Count II.

IV.

Denies, generally and specifically, each and every allegation set forth in Paragraphs 2, 5 and 6 of Count II.

V.

Admits the allegations set forth in Paragraphs 1 and 2 of Count III.

VI.

Denies, generally and specifically, each and every allegation set forth in Paragraphs 3, 4 and 5 of Count III.

Wherefore, defendant prays that plaintiff take nothing by reason of its action.

/s/ REED M. CLARKE,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Henry Johnson, being first sworn, deposes and says:

That he is the defendant in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to such matters as are therein stated upon information and belief and that, as to those matters, he believes them to be true.

/s/ HENRY JOHNSON.

Subscribed and sworn to before me this 12th day of January, 1950.

/s/ REED M. CLARKE,

Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause was commenced on July 7, 1949, the Plaintiff seeking injunction, restitution and treble damages under Sections 1(b), 205(a) and 205(c) of the Emergency Price Control

Act of 1942, as amended, and Sections 205 and 206(b) of the Housing and Rent Act of 1947, as amended, and came on regularly for trial on May 12, 1950, before this Court, the Honorable George B. Harris, Judge, presiding. Plaintiff appeared by its counsel, Raymond J. Fox, and defendant appeared by his counsel, Reed M. Clark. Thereupon evidence, both oral and documentary, was introduced by and on behalf of the parties. At the conclusion of the trial and after oral argument by counsel, the Court, being fully advised in the premises, makes the following:

Findings of Fact

1. That the housing accommodations described in Plaintiff's complaint herein are located within the San Francisco Bay Defense-Rental Area, and were at all times material to this action subject to the rent regulations issued pursuant to the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended.

2. That at all times material to this action the legal maximum rents for the housing accommodations described in Plaintiff's complaint herein were as follows:

1493 O'Farrell Street:

Room No. 2	$ 6.00 per week
Room No. 4	$24.00 per month
Room No. 6	$ 6.00 per week

1495 O'Farrell Street:

Room No. 1	$ 6.50 per week

Room No. 2............$26.00 per month
Room No. 3............$ 5.00 per week
Room No. 4............$ 5.50 per week
or $22.00 per month
Room No. 5............$ 5.50 per week
Room No. 7............$ 5.50 per week

3. That the defendant, in violation of the provisions of the aforesaid Acts and Regulations, did demand, accept and receive from the tenants named in Plaintiff's complaint herein, rents in excess of the legal maximum rents prescribed for the aforesaid housing accommodations, in the amount of One Thousand Nine Hundred Twenty-six and no/100 Dollars ($1,926.00) for the period October 1, 1946, to June 24, 1949.

Conclusions of Law

1. That the Court has jurisdiction of the subject matter of this action and of the parties under Sections 1(b), 205(a) and 205(c) of the Emergency Price Control Act of 1942, as amended, and Sections 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended.

2. That the Plaintiff herein, on account of the violations set forth in Paragraph 3 of the aforesaid Findings of Fact, is entitled to an injunction restraining the defendant from continuing in violation of the provisions of the Housing and Rent Act of 1947, as amended, and the rent regulations issued pursuant thereto, as prayed for in its complaint.

3. That the Plaintiff, on account of said violations, is entitled to judgment and decree requiring and directing the defendant, Henry Johnson, to forthwith refund to Plaintiff, on behalf of the hereinafter-named tenants, the excess rents collected by said defendant from said tenants for rental of the described housing accommodations, in the sum of One Thousand Nine Hundred Twenty-six Dollars ($1,926.00), to be distributed as follows:

Wilbert Guyden	$268.00
Riley Samuel	$208.00
Tillie Robinson	$282.00
Pauline Henderson	$342.00
Robert Castle	$ 54.00
Lester Houston	$224.00
Leslie Houston	$440.00
Willie Williams	$108.00

4. That Plaintiff is entitled to its costs in this action in the amount of $..........

Let judgment and decree be entered in accordance herewith.

Dated this 8th day of June, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged May 23, 1950.

[Endorsed]: Filed June 8, 1950.

United States District Court for the Northern District of California, Southern Division
No. 28995

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY JOHNSON,
Defendant.

JUDGMENT AND DECREE

Findings of Fact and Conclusions of Law having been filed herein,

Whereas, by reason of the law, the evidence and the premises contained in said Findings and Conclusions,

It Is Hereby Ordered, Adjudged and Decreed that the defendant, Henry Johnson, his attorneys, agents, employees, servants and all other persons in active concert or participation with the defendant, be, and they hereby are permanently enjoined and restrained from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any regulation or order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts or practices which constitute or will constitute a violation of the said Housing and Rent Act, or of any regulation or order adopted pursuant thereto.

It Is Further Ordered, Adjudged and Decreed that the defendant, Henry Johnson, be and he

hereby is required and directed to forthwith make restitution to the Plaintiff on behalf of the hereinafter-named tenants, overcharged by the defendant for rental of the housing accommodations specified in this cause, in the amount of One Thousand Nine Hundred Twenty-six and no/100 Dollars ($1,926.00), said payment to be made to the Treasurer of the United States, at the Office of the Housing Expediter, Litigation Section, 821 Market Street, San Francisco, California, to be distributed as follows:

Wilbert Guyden	$268.00
Riley Samuel	$208.00
Tillie Robinson	$282.00
Pauline Henderson	$342.00
Robert Castle	$ 54.00
Lester Houston	$224.00
Leslie Houston	$440.00
Willie Williams	$108.00

It Is Further Ordered, Adjudged and Decreed that Plaintiff recover its costs in this action in the amount of $73.10.

It Is Further Ordered, Adjudged and Decreed that execution of this Judgment and Decree shall be and is hereby stayed for thirty (30) days from the date of entry hereof.

Dated this 8th day of June, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged May 23, 1950.

[Endorsed]: Filed June 8, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Henry Johnson, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 8th, 1950.

/s/ REED M. CLARKE,
Attorney for Appellant.

[Endorsed]: Filed August 1, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant designates the entire record, consisting of the following, to be contained in the record on appeal in the above-entitled action:

1. Complaint.

2. Answer.

3. Transcript of the testimony offered or taken, the evidence offered or received, all rulings, acts, or statements of the court, also all objections or exceptions of counsel and all matters to which the same relate.

4. Findings of fact and conclusions of law.

5. Judgment.

6. Notice of Appeal.

7. This designation.

8. Designation, if any, by appellee of additional matters to be included in the record.

Dated: August 5, 1950.

/s/ REED M. CLARKE,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 5, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Defendant-Appellant herein may have to and including October 20, 1950, to file the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: September 8, 1950.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed September 8, 1950.

In the Southern Division of the United States District Court, for the Northern District of California

No. 28995

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY JOHNSON,

Defendant.

Before: Hon. George B. Harris,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:
RAYMOND J. FOX, ESQ.

For the Defendant:
REED M. CLARK, ESQ.

Friday, May 12, 1950, at 10:00 o'Clock A.M.

The Clerk: The case of United States of America versus Henry Johnson for trial.

Mr. Fox: Ready.

Mr. Clarke: Ready.

The Clerk: Your Honor please, may the record show that the United States is here represented by Raymond J. Fox, and the defendant is represented by Mr. Reed M. Clarke.

Mr. Fox: Your Honor please, this is a case brought by the Housing Expeditor in behalf of the

United States against Henry Johnson for rent overcharges, for an injunction and restitution and treble damages resulting from rent overcharges at 1493, 95 and 97 O'Farrell Street, brought under the emergency price control act of 1942, as amended, and the housing and rent act of 1947, as amended.

A motion for summary judgment was denied in this matter and at that time Judge Goodman signed a pre-trial order, or entered a pre-trial order which was later signed by him, which limits the issue to one issue, which is that of collection of rents, the only issue involved, Your Honor. All other things have been admitted by the pleadings, the names of the tenants, the period of occupancy and the legal maximum rents. I think, Mr.——

Mr. Clarke: We agree, the pleadings do admit all except the alleged overcharges; that is denied.

The Court: All right, just an accounting matter, is it? [2*]

Mr. Fox: It is to some extent, Your Honor. There is, maybe some discrepancies in the amounts, the testimony as to the amounts of overcharges and whether some of the tenants owe money or not.

The Court: Judge Goodman ordered that there were no remaining material issues in this matter except rents actually collected from the various tenants, that at the time of trial evidence will be taken solely on this point. Names of tenants, periods of occupancy and legal maximum rents are admitted by the defendant?

Mr. Clarke: That is right.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: Amounts actually collected by the defendant.

Mr. Clarke: We claim that we have charged and collected the legal maximum rent.

Mr. Fox: Call Riley Samuel.

RILEY SAMUEL

called as a witness in behalf of the Government, sworn.

The Clerk: Will you state your full name to the Court?

A. Riley Samuel.

The Clerk: Riley Samuel?

A. Right.

Direct Examination

By Mr. Fox:

Q. Mr. Samuel, you lived at 1493 O'Farrell Street? A. I did [3]

Q. Apartment number 4, is that right?

A. That's right.

Q. During that period what rent did you pay?

A. $32.00 a month.

Mr. Clarke: $32.00 a month is that it?

The Witness: That's right.

The Clerk: So the witnesses may hear what you say, speak up and speak toward this, will you?

Mr. Clarke: Just a moment, Your Honor.

Q. (By Mr. Fox): Mr. Johnson—who did you pay your rent to?

A. I paid it to Mr. Johnson.

(Testimony of Riley Samuel.)

Q. Did Mr. Johnson ever give you any receipts?

A. Yes, I got my receipt.

Q. Are these receipts Mr. Johnson gave you?

A. Yeah.

Mr. Fox: I have here, Your Honor, receipts from December 1, 1947——

Mr. Clarke: That December, counsel?

Mr. Fox: Excuse me, from June 2, 1947, through June 2, 1949, for three years, receipts.

The Court: Showing payments made in the amount of $32.00?

Mr. Fox: Showing payments in the amount of $32.00 for each month during that period.

Mr. Clarke: Just a moment, Your Honor.

Mr. Fox: I offer these in evidence, Your Honor.

The Court: Yes, sir.

The Clerk: Exhibit marked Government's Exhibit 1 in evidence.

(Whereupon the receipts above referred to, were marked Government's exhibit 1 in evidence.)

Mr. Clarke: If Your Honor please, we ask that the receipts subsequent to—just a moment, Your Honor. Withdraw that statement, Your Honor.

Mr. Fox: Your witness.

Mr. Clarke: No questions.

The Court: Call the next witness.

Mr. Fox: Mrs. Tillie Robinson, step forward.

The Court: Let us go right along, counsel.

Mr. Fox: Yes, sir.

MRS. TILLIE ROBINSON

called as a witness on behalf of the Government, sworn.

The Clerk: Will you state your full name to the Court?

A. Mrs. Tillie Robinson.

The Court: Affidavits are on file sworn by these witnesses?

Mr. Fox: Yes, Your Honor.

Direct Examination

By Mr. Fox:

Q. Mrs. Robinson, did you live at 1495 O'Farrell Street? A. I did.

Q. During the time you lived there how much rent did you pay? [5]

A. Well, I paid $10.00 which I paid, $10.00 and I paid $8.00.

Q. This is per week?

A. Yes. The one while I paid seven and——

The Court: Per week or per month?

The Witness: Per week.

The Court: You're schedule annexed to the complaint shows $8.00 a month, counsel. Did you pay $8.00 a month or $8.00 a week?

The Witness: A week.

Mr. Fox: Your Honor, I believe the rent collected on my copy it says $8.00 a week.

Mr. Clarke: Also $7.00 a week for part of the time.

(Testimony of Mrs. Tillie Robinson.)

The Court: On the schedule which is annexed to the complaint on file here shows Mrs. Tillie Robinson, item 1-D, room 4, $8.00 rent, 10/1/46, 11/1/46, $40.00 a month rent collected, maximum legal rent $8.00 a month—it should be $32.00—transposition there, isn't that true? It should be $32.00 and $8.00 is the amount of overcharge, is that right?

Mr. Fox: That is right, your Honor.

The Court: All right. So $8.00 is the amount of the overcharge, if any, as alleged. Is that one month?

Mr. Fox: Yes, sir, your Honor.

The Court: Will you clear that up?

Mr. Fox: I will change that.

The Court: Change that on your sheet. [6]

Mr. Fox: That is item 1.

The Court: Item 1-D. It will be $32.00 and a net difference in the amount of overcharge would be $8.00 on that one month. Does she have receipts for that $32.00?

Mr. Fox: Yes, your Honor.

The Court: Offer the receipt in evidence. Can't you stipulate to these, counsel? Any dispute on these matters?

Mr. Clarke: I understood there was.

The Court: It is a matter of receipt.

Mr. Clarke: If they are all matters of receipt, of course, we have to admit.

Mr. Fox: I have receipts for all of these overcharges.

The Court: Do you?

(Testimony of Mrs. Tillie Robinson.)

Mr. Fox: Yes, your Honor.

The Court: They should be a matter of stipulation, then.

Mr. Clarke: No need of tying up the court's time.

Mr. Fox: I can go over with Mr. Clarke here the receipts and show him each and every receipt there is. Naturally there are some missing and in one case the tenant had no receipts and that of——

The Court: Better go ahead, I see no sense here in taking up a day to try this case.

Mr. Clarke: I think we might be able, your Honor, we can go over these receipts together. I understand your Honor has to adjourn court at eleven anyhow and we might be able to [7] stipulate to a judgment.

The Court: All right, then.

Mr. Clarke: Might be able to save a great deal of Your Honor's time and the Court's time.

Mr. Fox: There is only one witness who has no receipts, maybe——

The Court: Put him on the stand.

Mr. Fox: You may be excused.

(Witness excused.)

The Court: And in addition these witnesses have filed affidavits and they are on file. Seems to be no dispute in the amounts.

Mr. Fox: That is right.

WILBERT GUYDON

called as a witness on behalf of the Government, sworn.

The Clerk: Will you state your full name to the Court, please?

A. Wilbert Guydon.

Direct Examination

By Mr. Fox:

Mr. Guydon, you lived at 1493 O'Farrell Street?

A. I did.

Q. Room number 2? A. 2.

Q. How much rent did you pay there? [8]

A. $8.00 a week.

Q. $8.00 a week. Did you pay that all the time?

A. No.

The Court: Correction should be noted. The schedule shows $7.50 per week.

Mr. Fox: Your Honor, I believe farther down it shows $8.00 per week.

The Court: On what item?

Mr. Fox: On one item for 19 weeks.

The Court: Yes.

Q. (By Mr. Fox): But previously to that I believe he paid $7.50, I was going to ask him—did you ever pay $7.50 a week?

A. When I did pay it was, we had a trial about something.

Mr. Clarke: I didn't understand.

The Witness: Go to Court and that is when they cut it to $7.00. I paid from October 7 until Decem-

(Testimony of Wilbert Guydon.)

ber, $7.50, and raised it back to $8.00. That was in '47.

Mr. Clarke: What year, October to December, what year?

The Witness: 1946.

Mr. Fox: 1946, you paid how much?

The Witness: $10.00 then. I paid $10.00 a week in '46 up until we had a trial.

Q. (By Mr. Fox): And from October, 1946, what did you start paying then? [9]

A. I paid in October of 1946, I paid, went to Court in December and I paid the back rent up until, up from October as $7.50.

Q. $7.50 a week?

Mr. Clarke: Frankly, counsel, your Honor, I don't understand what the witness means when he says he went to Court. The only time we have been in Court is today.

Mr. Fox: It was another matter.

Q. Was it not some other matter you went to Court on?

A. Yes, he wouldn't take my rent, some guy came to visit, and he wouldn't take my rent. On October 18, I went down to pay him and he wouldn't take it and I stayed there until December, when I had to go to Court.

Q. Is it your testimony you paid $7.50 per week from October, 1946, to June, 1947?

A. No, I did not until June, 1947, he raised after that around January in 1947?

Q. March, 1947?

(Testimony of Wilbert Guydon.)

A. Somewhere, I just don't remember now.

Mr. Fox: Your Honor, there is a correction that should be made in the complaint which I think can be done with a stipulation of counsel—from October, 1946——

The Court: To March 2, 1947?

Mr. Fox: To March 2, 1947, and then from March 2, 1947, to June 18, 1949, he paid $8.00 per week. [10]

Mr. Clark: Which we deny, and I am going to put a witness on for that.

The Court: All right, this is a disputed item then, Mr. Clarke?

Mr. Clarke: That's right.

Mr. Fox: That is all I have for this witness.

Mr. Clarke: That is all.

The Court: The purport of this testimony is that he paid—what is your version of it, counsel?

Mr. Fox: He paid $7.50 per week, your Honor, from August 11, 1946.

The Court: Yes.

Mr. Fox: To March 2, 1947.

The Court: Yes.

Mr. Clarke: Wait, now—March 2, 1947—yes.

Mr. Fox: And he thereafter, from March 2, 1947, to June 18, 1949, paid $8.00 a week.

The Court: $8.00 instead of $7.50.

Mr. Fox: Yes, there is an error in the complaint. Item 1-B remove entirely, that is covered down below in Item 2-A, which is Wilbert Guydon. Farther down on the sheet, your Honor.

(Testimony of Wilbert Guydon.)

The Court: Yes, number 2-A might be substituted in lieu of 1-B.

Mr. Fox: We will remove that 1-B item, if it is so stipulated by counsel. [11]

The Court: 1-B should go out as a duplicate; 2-A is a duplicate.

Mr. Fox: That is right, your Honor.

The Court: At least——

Mr. Clarke: Shall I call my witness?

The Court: I am striking the 1-B of this schedule as apparently a duplication, is that right, sir?

Mr. Fox: Yes, your Honor.

The Court: And 1-B is integrated, apparently in 2-A, which calls for an overpayment of an alleged amount of $238.00.

Mr. Fox: The items under one were items under the Emergency Price Control Act; the items two of the complaint are items under the Housing and Rent Act of 1947.

The Court: Yes.

Mr. Fox: Starting on June 30, 1947.

The Court: All right. This item then as to Wilbert Guydon stands disputed.

Mr. Clarke: That is right.

The Court: Any other disputed items, subject to check by counsel, on the receipts?

Mr. Fox: I have, your Honor, receipts for all others.

The Court: You have receipts for all other items?

(Testimony of Wilbert Guydon.)

Mr. Clarke: I want to put on some testimony as to this item, if I may.

The Court: What about the question of maximum legal rental; [12] any dispute on that score?

Mr. Fox: Your Honor, that was admitted.

Mr. Clarke: That is the registered—Mr. Johnson.

The Court: What is your defense, Mr. Clarke, if any?

Mr. Clarke: That this man did not collect from Guydon any such figure.

The Court: Guydon is the only matter in dispute?

Mr. Clarke: I don't know until I see these receipts.

The Court: All right.

HENRY JOHNSON

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your full name to the Court, please?

A. Henry Johnson.

Direct Examination

By Mr. Clarke:

Q. What is your business, Mr. Johnson?

A. Well, I am a—my occupation is chair car porter with the Southern Pacific.

(Testimony of Henry Johnson.)

Q. And how long have you been with the S.P.?

A. 8 years.

Q. Now, you know, of course, Mr. Guydon lived at your place? A. Yes, sir.

Q. How much rent did Guydon pay?

A. Guydon paid $7.00. I registered the place at $10.00 and [13] Guydon was cut down to $7.00 and then he brought his son in and brought his niece in, four of them in one room. That is when I refused to take his money.

Q. I see, has he ever paid you in excess of $7.00?

A. No more than $7.00 is all Guydon paid.

Q. Now, when was it that you registered the place at $10.00?

A. When I went down to the O.P.A. and registered and I staggered the rent around myself.

Mr. Clarke: Your witness.

Cross-Examination

By Mr. Fox:

Q. You say Mr. Guydon paid you $8.00?

A. $7.00.

Q. $7.00 per week? A. Yes.

Mr. Fox: I guess no other questions, Your Honor.

Mr. Clarke: That is all, Mr. Johnson, for the moment.

Mr. Clarke: Mrs. Johnson.

MRS. HENRY JOHNSON

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your full name to the Court, please?

A. Mrs. Henry Johnson.

The Clerk: Mrs. Henry Johnson?

A. That's right. [14]

Direct Examination

By Mr. Clarke:

Q. Mrs. Johnson, what rent did Mr. Guydon pay? A. Mr. Guydon paid $7.00.

Q. Has he ever paid more than $7.00?

A. No, Mr. Guydon, when he came in he paid, when he first came and take the room.

Q. Yes. A. It was a $10.00 room.

Q. That was what it was registered for?

A. Then, but then after he paid seven.

Q. $7.00.

A. And he had the room full of people, but the other——

Mr. Fox: Counsel, there is no dispute on the maximum rent?

Mr. Clarke: No, but it is a retroactive order, isn't it?

Mr. Fox: No order concerning that room.

Mr. Clarke: I think we can stipulate to these various facts when we get——

The Court: Do you have any books of account, Mr. Guydon keep books of account at all?

(Testimony of Mrs. Henry Johnson.)

Mr. Fox: No——

The Court: Johnson, pardon me. I meant Mr. Johnson. No books?

Mr. Clarke: No.

Mr. Fox: I have no questions to ask.

Mr. Clarke: That is all for the moment, Mrs. Johnson.

The Court: Step down. [15]

(Witness excused.)

Mr. Fox: In view of the fact that counsel stipulated to the maximum rents I didn't bring any records of the maximum rents into Court, Your Honor, and as to whether or not this apartment, or this room, number 2, ever had a $10.00 per week maximum rent, I wouldn't be able to say at this point.

The Court: Number 2 in the Guydon transaction?

Mr. Clarke: That is right.

Mr. Fox: That is the one, we were just discussing and I don't think it is—in view of the fact the maximum rent is $6.00 a week during the period Mr. Guydon was there——

The Court: Do you have the amount of overcharge in there?

Mr. Fox: It is around $2000.00 in the whole.

The Court: Conceding that the receipts be in order and conceding that claim is as alleged, it is a very substantial amount of money.

Mr. Clarke: If Your Honor please, may I sug-

gest, as long as Your Honor is going to adjourn until 2:30, 2:15, if Your Honor takes the adjournment now, counsel and myself——

The Court: I will be glad to, Mr. Clark. If there be any items that you are in dispute concerning, I would suggest you have your witness remain over, these witnesses.

Mr. Fox: Yes.

The Court: And in the meantime go over the items. Apparently just the amount due. [16]

Mr. Fox: There are, naturally, in some instances, not all the receipts are there.

The Court: Those showed continuity?

Mr. Fox: Continuity of receipts, yes, sir.

The Court: All right. Recess until two o'clock, two fifteen.

(Thereupon an adjournment was taken until 2:15 p.m. this afternoon.) [16-A]

Friday, May 12, 1950, at 2:15 P.M.

The Clerk: The case of the United States of America versus Henry Johnson on trial.

Mr. Clarke: Ready.

Mr. Fox: Ready. Your Honor, during the recess Mr. Clarke and I have gone over each and every one of these tenants and the amount of money they paid and in the course of our discussion we found that there were certain discrepancies in the maximum legal rent as shown on our complaint, so even though Mr. Clarke has agreed to the maximum rents, I think we can stipulate to certain changes being made.

Mr. Clarke: That is right.

Mr. Fox: There are three tenants which we have disputes as to the maximum rent, in view of the fact that Mr. Johnson states that there were more people in occupancy than the tenants state, so that in those cases we might have to take testimony, Your Honor.

Mr. Clarke: Very short.

The Court: All right.

Mr. Clarke: May I just explain to Your Honor?

The Court: Yes.

Mr. Clarke: That apparently this is a sliding scale, so much for one person, a little more for two and a little more for three, so Your Honor will understand.

Mr. Fox: I will call Mr. Wilbert Guydon. He was sworn. [17]

The Court: He has been sworn?

The Clerk: Yes.

WILBERT GUYDON

recalled as a witness on behalf of the Government, previously sworn.

The Clerk: The witness on the witness stand is Wilbert Guydon, G-u-y-d-o-n, heretofore sworn.

Direct Examination

By Mr. Fox:

Q. Mr. Guydon, while you were in occupancy at 1493 O'Farrell Street how many persons occupied your room?

(Testimony of Wilbert Guydon.)

A. Well, sometime, there was my son, until I told him about my son-in-law coming to visit me—I told him my son was coming to visit me. He said it would be all right. He said he would make arrangements, so he came out in October and he didn't make no arrangement after he got here, so I got him a cot and my sister-in-law, she came on too and she went to work for Christian and that is where she was working, also staying there, but come on Thursday and on Sundays is off.

Q. You testified that from—most of that period two occupied that room? A. Yes.

Mr. Fox: And the legal maximum rent for two, Your Honor, is $6.00 per week, which is in accordance with our——

The Court: Yes. [18]

Cross-Examination

By Mr. Clarke:

Q. Mr. Guydon, didn't your sister-in-law sleep there a great part of the time?

A. No, she didn't.

Q. Your're positive of that? A. Positive.

Mr. Clarke: Okay.

Q. Do you owe any rent?

A. No, I don't, not one penny.

Q. Okay, that is all.

Mr. Fox: That is all of that.

The Court: That is all, step down.

(Witness excused.)

Mr. Fox: Mrs. Tillie Robinson. Her case also is a question of occupancy. She has not been sworn.

The Court: Tillie Robinson was sworn. The witness is

MRS. TILLIE ROBINSON

heretofore sworn.

Direct Examination

By Mr. Fox:

Q. Mrs. Robinson, you lived at 1495 O' Farrell Street? A. I did.

Q. During that period how many persons occupied your room?

A. Well, just about a month or two my son come home from college and he stayed there until we took another room and then they moved on Bush, 2827 Bush, and I acquired the room by myself, because I am a widow. [19]

Q. How long was your son with you?

A. Oh, about, probably two months.

Q. Two months about the entire period you were there? A. That's right.

Q. And all other times you were alone?

A. I was alone, definitely.

Mr. Fox: That is all I have.

Mr. Clarke: Just a minute.

Cross-Examination

By Mr. Clarke:

Q. Mrs. Robinson, isn't it a fact that your son occupied the place with you for many months?

A. It is not.

Mr. Clarke: That is all.

Mr. Fox: That is all.

The Witness: Thank you.

The Court: You may step down.

(Witness excused.)

Mr. Fox: Your Honor, the legal maximum rent for one person,—$22.00 for two persons, $22.00 per month, is at the rate of $5.50 per week; one, $18.00 a month and $4.50 per week. I am going to stipulate that there were two people.

Mr. Clarke: I have testimony repudiating that.

Mr. Fox: Miss Pauline Henderson.

The Court: The schedule shows $4.50 a week on Tillie Robinson. [20]

Mr. Fox: That is right, Your Honor.

The Court: Is that correct?

Mr. Fox: $4.50 per week for one and $5.50 per week for two.

PAULINE HENDERSON

called as a witness on behalf of the government, sworn.

The Clerk: Will you state your full name to the Court, please?

A. Pauline Henderson, H-e-n-d-e-r-s-o-n.

Direct Examination

By Mr. Fox:

Q. Mrs. Henderson, you lived at 1495 O'Farrell Street, room number 1? A. Yes, I did.

(Testimony of Pauline Henderson.)

Q. During the period that you lived there how much rent did you pay?

A. The first year I paid $10.00 and I was paying $7.00 for two months, a week, and after that I paid $8.00 a week until I moved away from there.

Q. How many people lived in your room?

A. Only one.

Q. Nobody else?

A. No one lived there but me, when I paid my rent.

Mr. Fox: That is all.

Cross Examination

By Mr. Clarke:

Q. Isn't it a fact that most of the rent was [21] paid by a man?

A. No, indeed, my friend, I paid the rent, I worked and I pay my own rent.

Q. Mrs. Henderson, what man was it—did you ever have a man pay your rent? A. Never.

Q. Did you ever give a man some money and tell him to go up——

A. (Interrupting): No, sir, never, no man paid my rent; I paid my own.

Q. Wasn't there a period of five months you didn't pay a cent?

A. I pay my rent all the time, I had a savings account and I paid it all the time.

Q. Is it or is it not true that for five months you never paid one penny? A. It isn't true.

Mr. Clarke: All right, that is all.

Mr. Fox: The rest of the tenants we agree as to the occupancy, Your Honor. There are no others.

Mr. Clarke: I think that is correct.

HENRY JOHNSON

the defendant recalled, having been previously sworn, testified as follows:

The Clerk: The witness on the witness stand is Henry Johnson, heretofore sworn. [22]

Direct Examination

By Mr. Clarke:

Q. Mr. Johnson, how many people occupied the apartment that was rented to Pauline Henderson?

A. Two.

Q. And who was the other party?

A. John Henderson, a man I rented to.

Q. John Henderson?

A. I rented it to him and another woman first and second he brought in this other woman claiming that was his real wife.

Q. You originally rented the place to two, Mr. John Henderson and some other woman?

A. Another woman he brought there first.

Q. After Pauline came in did Mr. John Henderson continue to live there?

A. Continued on there until they busted up.

Q. Anybody else occupy the place?

A. She had somebody up there off and on all the time.

Q. I see. Who paid the rent?

(Testimony of Henry Johnson.)

A. She paid the rent down, as long as she had a job.

Q. Does she owe you any rent?

A. Well, I gave her quite a bit of rent, but I can't disrecall just exactly how much it was, but she got out of a job and she was out of a job for quite awhile.

Q. About how long?

A. That woman was out of a job five, six months.

Q. Yes, and during that time did she pay you rent? [23]

A. When she began to get a little money. I gave that woman credit.

Q. You let her stay without paying rent?

A. I let her stay there.

Q. And she never has paid that rent?

A. Oh, no, she ain't paid, she moved, and I didn't know she was even gone.

Cross-Examination

By Mr. Fox:

Q. Mr. Johnson, with respect to Pauline Henderson, you state that she lived there rent free for a period without paying any rent, for a period of time? A, Oh, yes, she did.

Q. How long was that, do you know?

A. Oh, I don't know just the day, but it was quite a long period, five or six months. The woman was out of work and had no money.

Mr. Fox: That is all.

(Testimony of Henry Johnson.)

Redirect Examination

By Mr. Clarke:

Q. Now, with respect to Mr. Guydon, Guydon, whatever his name is, how many people occupied that place?

A. From three to four all the time.

Q. I see, and do you know who they were and what relation?

A. Yes, it was his son and sister-in-laws and it was a sister-in-law and his son.

Q. Sister-in-law and son? [24]

A. So they tell me, a son. I imagine it was a son, all right.

Q. You testified this morning that as to Mr. Guydon he paid how much? A. $7.00 a week.

Q. Never any more? A. Never no more.

Q. Now, as to Robert Castle, does he owe you any rent?

A. Does he owe me any rent? He owes me 21 days rent now.

Q. At $6.00 a week, the legal rent, that is $18.00. Now, Tillie Robinson, how many people occupied her apartment?

A. Tillie Robinson, her brother-in-law rented that apartment and he rented that apartment himself.

Q. Yes.

A. And her and her son occupied it.

Q. Did—now, she has testified——

A. (Interrupting): When he came in, all three of them had keys to the apartment, all three of

(Testimony of Henry Johnson.)

them carried keys when they come in. Of course, he stayed on the water all the time, most of the times, mostly two or three months, when he came in, why, he hung his hat up.

Q. Now she has testified here that her son was not there much over a month. Is that true?

A. Everyone had a key to that room, that at all times they come and go when they got ready.

Q. While I have you on the witness stand I call your attention [25] to the registration.

Would you mark this for identification?

Mr. Fox: Those the originals?

The Court: You can withdraw them.

Mr. Clarke: Yes.

The Clerk: Marked defendant's exhibit A for identification.

Mr. Fox: Offer them in evidence by stipulation.

Mr. Clarke: We will offer them by stipulation in evidence.

The Clerk: Marked defendant's exhibit A in evidence.

(Whereupon the document above referred to, marked defendant's exhibit A, was received in evidence.)

Mr. Clarke: Thank you.

Q. I show you two portions—withdraw that. When did you buy this place, Mr. Johnson?

A. '45

Q. 1945? A. 1945.

Q. Now, I show you two sheets, one bearing a date April 4, 1945, showing a registration of $10.00

(Testimony of Henry Johnson.)

for the following apartments at 1493: 1, 2, 3, 4, 5, 6, and 7 what purports to be your signature at the bottom and ask you if that is your signature when you registered? A. Yes, when I registered.

Q. Yes. Now, I show you another portion of this exhibit which is dated April 4, 1946, and which registers apparently 1493 [26] —that is a copy—I will withdraw that.

Q. I will show you another sheet dated April 3, 1946, which purports to be a registration of apartment 8 at 1493 and apartments 1, 2, 3, 4, 5 and 6 at 1495, and ask you if that is your signature down at the bottom there?

A. Yes, that is me, I registered.

Q. In other words, you registered—also show you another sheet bearing the date April 3, 1946, purporting to register, at 1495 O'Farrell, apartments 7 and 8, and at 1497 apartments 3, 4, 5, and 7, each at $10.00, and ask you if that is also your signature?

A. Yes.

Q. I show you a portion of this same document bearing the date October 7, 1945——

Mr. Fox: 1946.

Mr. Clarke: I beg your pardon, 1946.

Q. (Continuing): Purporting to change the registration to certain weekly rates and monthly rates set forth therein. I will ask you if you ever received a copy of that document or ever heard of it until this action came up?

A. I registered the place in '45. I never got no breakdown papers, never received no reducement papers from that time up until this come up.

(Testimony of Henry Johnson.)

them carried keys when they come in. Of course, he stayed on the water all the time, most of the times, mostly two or three months, when he came in, why, he hung his hat up.

Q. Now she has testified here that her son was not there much over a month. Is that true?

A. Everyone had a key to that room, that at all times they come and go when they got ready.

Q. While I have you on the witness stand I call your attention [25] to the registration.

Would you mark this for identification?

Mr. Fox: Those the originals?

The Court: You can withdraw them.

Mr. Clarke: Yes.

The Clerk: Marked defendant's exhibit A for identification.

Mr. Fox: Offer them in evidence by stipulation.

Mr. Clarke: We will offer them by stipulation in evidence.

The Clerk: Marked defendant's exhibit A in evidence.

(Whereupon the document above referred to, marked defendant's exhibit A, was received in evidence.)

Mr. Clarke: Thank you.

Q. I show you two portions—withdraw that. When did you buy this place, Mr. Johnson?

A. '45

Q. 1945? A. 1945.

Q. Now, I show you two sheets, one bearing a date April 4, 1945, showing a registration of $10.00

(Testimony of Henry Johnson.)

for the following apartments at 1493: 1, 2, 3, 4, 5, 6, and 7 what purports to be your signature at the bottom and ask you if that is your signature when you registered? A. Yes, when I registered.

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A. Yes.

Q. I show you a portion of this same document bearing the date October 7, 1945——

Mr. Fox: 1946.

Mr. Clarke: I beg your pardon, 1946.

Q. (Continuing): Purporting to change the registration to certain weekly rates and monthly rates set forth therein. I will ask you if you ever received a copy of that document or ever heard of it until this action came up?

A. I registered the place in '45. I never got no breakdown papers, never received no reducement papers from that time up until this come up.

(Testimony of Henry Johnson.)

Q. And that is also true with another portion of the document bearing the date September 7, 1949; you never had a copy of that? [27]

A. The last.

Q. You did get a copy?

A. They sent me a copy of this '49.

Q. So in other words during all of this time you believe, did you not, that $10.00 was the legal rent to be charged?

A. Absolutely, I swear. Registered and staggered down the different rooms on account of people had been there quite a bit, well, due to the fact that I registered it and that is why I kept the best part of it, while I registered, of course, I gave other people the benefit of the doubt, I gave them everything that could be given to them.

Recross-Examination

By Mr. Fox:

Q. Mr. Johnson—we have stipulated, your Honor, that this can be introduced in evidence.

Mr. Clarke: Surely.

Q. (By Mr. Fox): The first that Mr. Clarke read off were the registrations as Mr. Johnson registered them. The third is the order of the rent director reducing the rents in accordance with the comparable rents in the area, which was dated October 7, 1946.

Q. You state you have never seen this?

A. Never sent me anything.

Mr. Fox: Well, your Honor, then there is nobody in Court, can't find anybody today that could

(Testimony of Henry Johnson.)
state whether such and such a thing has been mailed, but it is presumed mailed by the [28] area rent office.

The Court: Do you dispute the mailing?

Mr. Clarke: Pardon?

The Court: Do you dispute the receipt of that document?

Mr. Clarke: No, never received it, that is what——

Mr. Fox: That is the dispute.

Mr. Clarke: I am trying, in other words, to show, your Honor, a negative—any idea of a reference of deliberate violation.

Mr. Fox: In any event, these are still the legal rents.

The Court: Have you anyone who would testify that that was mailed in the regular course?

Mr. Fox: Your Honor, it is 1946 and I doubt if I could find the person who actually would even remember sending out these in the ordinary course, at least this particular document.

Q. With regard to your testimony concerning Tillie Robinson, Mr. Johnson, you stated that she and her son stayed there, is that right?

A. Yes, sir, and her brother-in-law, he was there, he was the man that got the money for her and he was the one that made the arrangements.

Q. Is it your testimony then that Mrs. Robinson's son stayed there all the time with her?

A. He had a key all the time, he come and go when he got ready. [29]

(Testimony of Henry Johnson.)

Q. But he wasn't there actually all the time?

A. I don't watch the rooms to see just who is up there, I just seen them coming and going.

Q. With respect to the, to the testimony concerning Mrs. Henderson, Pauline Henderson, you stated that there were two people occupying her room?

A. Absolutely there was two—first of all may I say I never sleep one person in a room, never did. I always made that plain, everybody that come by.

Q. Did you ever see the person who occupied the room with her? A. John Henderson.

Q. Was John Henderson her husband?

A. Well, I don't know, that is what he said, she is going under the Henderson name.

Q. Doesn't Pauline Henderson have a sister?

A. Yes, she has got a sister.

Q. Her sister's name is also Henderson, is it?

A. Not as I knows it. Could be, I don't know, I don't know even what her sister's name is.

Q. With respect to the testimony of Wilbert Guydon, you state that he had, you state he had three to four? A. From three to four.

Q. Three to four people.

Mr. Fox' Your Honor, those people——

The Court: How big are the rooms? [30]

Q. (By Mr. Fox): How big is room number 2?

A. 20 by 20.

Q. 20 by 20?

The Court: 20 by what?

The Witness: 20 by 20.

(Testimony of Henry Johnson.)

Mr. Fox: Four people living in a room 20 by 20?

A. Absolutely, I was up there once when they were sleeping, the others up there.

Q. Do you know which people?

A. His son and his sister-in-law.

Q. And who else?

A. His wife and him.

Q. That is four. And how long were his son and sister-in-law there?

A. I don't know he was up there for a long time because I take him to Court on account I was had all these people up there for $7.00 a week and I didn't want but two people in those rooms.

Q. How old is this son?

The Court: Where did you take them to Court?

The Witness: Oh, why did we?

The Court: You had to take them to Court?

A. Yes, he went to court.

Q. (By Mr. Fox): How old is his son?

A. Oh, I don't know just exactly, but he is about at that [31] time, I imagine he was about ten, twelve years old, something like that, I imagine.

Mr. Fox: Your Honor, with respect to Mrs. Henderson, she said that she has somebody in the Courtroom who could testify, support her testimony if you wish. Mr. Castle is not here, so I am not able——

The Court: This business of four people in one room under the Guydon transaction, Mr. Guydon told us, mention was made in the earlier part of the

(Testimony of Henry Johnson.)

day that a suit was brought by the man against Guydon for eviction with respect to the other people.

The Witness: Yes.

The Court: To get them out?

The Witness: Yes.

The Court: Here in Municipal Court?

The Witness: No, it was in the City Hall.

Q. Did you get them out?

A. Well, once they didn't, they stayed on.

The Court: Four stayed there?

The Witness: Yes.

The Court: Well, that is something to consider on that score, they violate every health ordinance, four people in a room 20 by 20 violates the tenant act.

Mr. Clarke: No question.

The Court: I don't know how to consider that Guydon transaction, counsel. Better check that lawsuit. [32]

Mr. Fox: Check the lawsuit?

The Court: If there is a lawsuit on file it would give credence.

Mr. Fox: Your Honor, we are willing to stipulate there were three or four people as the suit will bear that out.

Mr. Clarke: I didn't handle that case, so I couldn't tell you.

The Court: You are willing to stipulate?

Mr. Fox: If the lawsuit would bear out the findings that they were.

(Testimony of Henry Johnson.)

The Court: Give credence to the man's testimony.

Mr. Fox: Yes, your Honor.

The Court: And if there is a lawsuit and if there was an eviction, sort of an order made for eviction, I would be inclined to believe this testimony on that score, some credible support.

Mr. Fox: With respect to that——

The Court: To that one transaction, on the Henderson transaction, there is some veiled allusions she was living with somebody there. This man thinks John Henderson——

Mr. Clarke: He goes one step further, he says John Henderson originally rented the place with another woman.

The Court: Of course, we are not trying Henderson's morals, or John Henderson's morals with this woman.

Mr. Clarke: I have one more witness. [33]

Mr. Fox: And I have, she said she would have a witness to support her on that score.

The Court: Is that all of this witness?

Mr. Fox: That is all.

The Court: Step down.

(Witness excused.)

Mr. Clarke: Mrs. Johnson.

MRS. HENRY JOHNSON

recalled on behalf of the defendant, previously sworn.

(Testimony of Mrs. Henry Johnson.)

The Clerk: She has already been sworn.

The Court: If it will save you any time, counsel, and expedite the hearing in this case I will tell you I am not going to allow treble damages.

Mr. Clarke: It will help.

The Court: I am not going to allow it.

Direct Examination

By Mr. Clarke:

Q. Now, Mr. Johnson, how many people occupied the apartment of Mr. Guydon? A. Four.

Q. And they——

The Court: Was that one?

Mr. Fox: Four.

The Court: Four.

The Witness: That was—you mean the room?

The Court: Guydon, that is room number 2? [34]

The Witness: 2.

The Court: Four people?

The Witness: Four people that was there.

Q. (By Mr. Clarke): Who were there?

A. Him and Mary and I don't know what the girl's name is, sister-in-law, I can't recall her name, and son.

Q. And his wife? A. That's right.

Q. Now, with respect to Tillie Robinson, how many people occupied that apartment?

A. Well, Robert Jean had a cot with his mother and stayed in there until his mother went to Texas

(Testimony of Mrs. Henry Johnson.)

and then went up on Bush Street. He lived—he and his wife lived—he didn't have a wife then, he was just there with his mother, just out of school.

The Court: Just out of school?

The Witness: Just out of school, yes, sir.

The Court: All right.

Q. (By Mr. Clarke): Now, with respect to Pauline Henderson, how many people occupied that place?

A. Mr. Henderson came in and rented the house. We don't rent rooms to singles, I don't have a single man, single woman in the room, they have to be couples. And Henderson came in and rented the room for him and his wife and be brought in the woman, we don't know who she was and stayed awhile, and [35] pretty soon, "Mrs. Johnson, I am bringing my wife home, she has been operated on." And he brought Pauline.

Q. He brought this lady?

A. Brought Pauline. And he occupied it until they got a scrumpage, stayed until they got into a scrumpage and he left and she called us both up there one night and asked us to please not put her out, because she didn't have no place to go and her husband was going and we just kept her in there.

Q. For how long a time did she fail to pay rent?

A. She failed to pay rent, she went home and when she come back, why, she lost her job, she lost her job and she couldn't pay rent, stayed along, paid the rent on time up until then.

Q. How long? [36]

(Testimony of Mrs. Henry Johnson.)

A. I think it was around, oh, about five months or more when she paid no rent. We didn't charge her and she asked me, "Mrs. Johnson, don't say nothing to the other people about this." And I says, "I will not, Pauline." I says, "This is mine, yours and dad's affairs."

Q. Now, about Robert Castle, does he owe you three weeks' rent?

A. Yes, sir, he does.

Q. $6.00 a week, or $18.00.

Mr. Clarke: Cross-examine.

Cross-Examination

By Mr. Fox:

Q. Mrs. Johnson, Robert Castle——

The Court: Room 6?

Mr. Fox: 2-C, your Honor.

The Court: Yes.

Mr. Fox: Mr. Johnson, with regard to Pauline Henderson, you stated that she didn't pay rent for five months? When was that period?

A. Well, it must have been, I didn't even keep the time that she was in there, because she wasn't paying money, we just give it to her and I didn't——

Q. Do you know what year it was?

A. Yes, it was just before she left. I think it was about—no, I don't, but she—anyway she knows she didn't, she knows. Asked me not to tell the people on the floor. She knows all about it, she knows she didn't do it. [37]

(Testimony of Mrs. Henry Johnson.)

Q. With respect to Mr. Castle, what three weeks does he owe you rent?

A. Before he left out there.

Q. He didn't pay the last three weeks just before he left?

A. Sure, you got it down when he left.

Q. Is it your testimony that Mrs. Henderson lived there alone, lived there with another person?

A. She never was alone, she had other people come in. Sure, she knew.

Q. Was there a Mr. Henderson?

A. Mr. Henderson, she got somebody else all the time.

Q. When did Mr. Henderson leave?

A. He was away from there for quite awhile.

Q. But she was——

A. I don't know when he quit this woman.

Q. So far as you knew she was alone, but people used to come in occasionally?

A. Why, sure; yes, sir. Come in, sure. She know I know it, she knows who it was that went up there.

Mr. Fox: That is all I have.

Redirect Examination

By Mr. Clarke:

Q. You never rent, Mrs. Johnson, to single people? A. No, I do not.

Q. Always a couple? [38]

A. That is all, I don't have singles.

Mr. Clarke: That is all.

(Witness excused.)

MRS. GEORGIA HOUSTON

called as a witness on behalf of the Government, sworn.

The Clerk: Will you state your full name to the Court?

A. Mrs. Georgia Houston.

Direct Examination

By Mr. Fox:

Q. Mrs. Houston, are you the wife of Leslie Houston? A. That's right.

Q. The tenant of apartment number——

A. 3.

Q. 3. During the period you were there did you know Pauline Henderson? A. Yes, I did.

Q. You know how many people lived in the apartment occupied by Pauline Henderson?

A. Well, as far as I remember, if there was anybody else there I don't know where she kept them.

The Court: What is that?

The Witness: Besides her.

Mr. Fox: She said if there was anybody else she didn't know where she kept them. [39]

The Court: Besides Mrs. Henderson?

The Witness: Besides Mrs. Henderson.

The Court: Never saw anyone there?

The Witness: No, sir.

The Court: Anyone by the name of John Henderson?

The Witness: No, sir.

The Court: Positive of that?

The Witness: I am positive.

(Testimony of Mrs. Georgia Houston.)

The Court: You're under oath.

The Witness: Yes, sir, I am positive.

Q. (By Mr. Fox): Did you ever have a conversation with Mrs. Henderson concerning the rent payments?

Mr. Clarke: Concerning what?

Mr. Fox: Rent payments.

A. I can state this reason with a clear mind, is this reason why Mrs. Henderson's receipt and mine was mixed once, I got her receipt and she got mine. Therefore, Mrs. Johnson had to come in with Pauline's receipt and give it to her and mine, because I realized it was $8.00 on hers and it was $10.00 on mine and therefore I knew mine, and she straightened it out for us.

Mr. Fox: That is immaterial.

Mr. Clarke: Just one question.

Cross-Examination

By Mr. Clarke:

Q. Do you know John Henderson? [40]

A. No, sir.

Q. Did you ever see him there or a man who calls himself John Henderson? A. No, sir.

Q. When did Mrs. Henderson first go into that place, if you know, the time.

A. She was there when we moved in.

Q. About when?

A. Oh, we moved in September, 1947.

Q. At the time she was living there, 1947?

(Testimony of Mrs. Georgia Houston.)

A. That is right.

Q. And didn't she ever discuss with you her husband John? A. No, sir, she never did.

Mr. Clarke: That is all.

The Court: How often did you go in this room?

A. Oh, quite often.

The Court: Morning, afternoon, night?

The Witness: Well, Mrs. Henderson worked and at the time I didn't, so therefore just, we didn't go in daily at either place.

The Court: Do you know whether she was ever married?

The Witness: Well, I couldn't swear, because I don't know.

The Court: But at least you never saw any man around there?

The Witness: That is right.

Mr. Clarke: That is all. [41]

Mr. Fox: I would like to call back Mrs. Henderson concerning her non-payment of rent for five months.

Mr. Clarke: She has testified to that.

The Court: She testified she paid in full.

Mr. Clarke: That is right.

Mr. Fox: Then there would be no——

The Court: No purpose in recalling her.

Mr. Fox: I have another witness, your Honor.

Mr. Clarke: Now, if your Honor please, at this time I am willing to enter into this stipulation and if your Honor would follow the exhibit there.

The Court: The schedule, Mr. Clarke, you have in mind?

Mr. Clarke: Schedule, yes. I want to state frankly at the outset that this stipulation is limited to the discrepancy between the $10.00 in some cases $8.00, charged and what this purports to be the legal rent, although it is uncontradicted, that this defendant thought at all times he was entitled to charge ten. Now, I am willing to stipulate as to Wilbert Guydon the alleged overcharge is $30.00.

Mr. Fox: Excuse me, under item 1-A?

Mr. Clarke: That's right.

The Court: Well, that is——

Mr. Fox: They appear several places, the names, your Honor.

Mr. Clarke: Now, as to item 1-C, I am willing to stipulate [42] that it is $8.00, the amount of the alleged overcharge.

The Court: All right.

Mr. Clarke: 1-D, $18.00.

The Court: That's correct. There was a change in that item.

Mr. Fox: That is right, your Honor.

Mr. Clarke: 1-E, $13.50.

Mr. Fox: In that case the question is whether her son lived there all the time or whether it was——

The Court: I think her son was there part time. I would accept the stipulation of counsel.

Mr. Fox: All right, $13.50.

Mr. Clarke: As to 1-F, $57.50.

The Court: Yes, accept that.

Mr. Clarke: 1-G, $136.50.

The Court: I want to know now, there is another matter, this matter of Pauline Henderson, either was with a man there, or not.

Mr. Clarke: I say I am willing to stipulate that is the discrepancy, of course; your Honor will have to determine that.

The Court: Under the circumstances I will accept it.

Mr. Fox: You will accept it?

The Court: Yes.

Mr. Fox: All right, $136.50 would be the overcharge then.

The Court: On the Guydon's put it on the basis of two [43] persons in a room. I can't believe that four remained in that room, put it on the basis of two.

Mr. Fox: That will leave 2-A the same, $238.00.

Mr. Clarke: 2-A?

The Court: I can't believe four people in a room, cooked and everything else; perhaps they were.

Mr. Clarke: 2-A.

The Court: Wilbert Guydon.

Mr. Clarke: $238.00?

The Court: Yes.

Mr. Clarke: 2-B, $200.00.

The Court: Samuel, 2-B.

Mr. Fox: There was no discrepancy——

The Court: No dispute?

Mr. Fox: ——as to Mr. Samuel.

Mr. Clarke: Now, Robert Castle. The discrep-

ancy in the figures is $72.00, but there is a question of the $18.00.

The Court: $18, I will allow the offset.

Mr. Fox: $18.00 from $72.00, $54.00.

Mr. Clarke: $54.00, 2-C. 2-B, $37.50.

The Court: That is Pauline Henderson?

Mr. Fox: Yes.

Mr. Clarke: 2-E, $168.00.

Mr. Fox: That is based on two people.

The Court: I will accept it.

Mr. Clarke: 2-F, $112.00. [44]

Mr. Fox: That is with regard to 2-F, your Honor, Mr. Houston.

The Court: No dispute?

Mr. Fox: No dispute, the only dispute as to the maximum rent.

The Court: No dispute as to occupancy?

Mr. Fox: No dispute as to occupancy.

The Court: What is the situation on that, Mr. Clarke? I didn't hear evidence on Mr. Houston.

Mr. Clarke: That is right, your Honor. I thought these figures we agreed on.

The Court: Did you agree on a figure, and if you agreed I will accept your agreement.

Mr. Fox: We agreed in view of the fact that the maximum rent there has been changed to $26.00 a month by the office, I thought that——

The Court: All right, I will accept your figures.

Mr. Clarke: $112.00.

The Court: So ordered.

Mr. Clarke: For the next item, 2-G, the same amount.

The Court: So ordered.

Mr. Clarke: $112.00. 2-H, $440.00.

The Court: All right.

Mr. Clarke: 2-I, $25.50.

The Court: So ordered. [45]

Mr. Clarke: 2-J, $18.00.

The Court: So ordered.

Mr. Clarke: 2-K, $150.00.

The Court: So ordered.

Mr. Clarke: 2-L.

Mr. Fox: $108.50.

Mr. Clarke: $108.50.

The Court: So ordered.

Mr. Clarke: Now, let me make myself plain that I am stipulating as to the differential and the amounts as shown, that I would like your Honor, before determining the case to read over, if you will, the defendant's exhibit, glance at it, defendant's exhibit in evidence and I think you will be interested to read it.

The Court: You want me to read this?

Mr. Clarke: Read it at your leisure.

The Court: What is the purpose?

Mr. Fox: Those are the legal maximum rents in effect.

The Court: Is there any sense of that? The issue has been removed on that.

Mr. Clarke: I am stipulating that is what they have done there, but the question in my mind, was he bound by it until he received notice. That is the question and I think that is a question your Honor must determine.

Mr. Fox: That is an administrative matter. [46]

The Court: I am satisfied he was bound by it, satisfied he was bound by it. I am denying treble damages.

Mr. Clarke: That is right.

The Court: But he bound by it.

Mr. Fox: Your Honor——

The Court: Judgment may be—treble damages denied; judgment may be entered in the amounts indicated by the stipulation of counsel, and be embraced in my order.

Mr. Clarke: Thirty days stay?

The Court: Yes.

Mr. Fox: May I have an injunction?

The Court: Yes, sir.

Mr. Fox: And cost?

The Court: Whatever the costs may be. You solved a very difficult problem, Mr. Clarke.

Mr. Clarke: Thank you, your Honor, very much.

The Court: I appreciate the cooperation.

Mr. Clarke: We got together.

The Court: I appreciate your cooperation very much.

Mr. Fox: Thank you, your Honor.

The Clerk: If your Honor please, do counsel have the figures, the total?

Mr. Fox: I don't have them complete, they changed during our conversation here.

The Court: Subject to check.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter pro tem, certify that the foregoing transcript of 47 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RUSSELL D. NORTON.

[Endorsed]: Filed November 10, 1950. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint For Injunction, Restitution and Treble Damages. Includes Exhibit A-3 pages of Schedules.

Answer.

Findings of Fact and Conclusions of Law.

Judgment and Decree.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order Extending Time to Docket.

Plaintiff's Exhibit No. 1—25 Receipts.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of October, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12713. United States Court of Appeals for the Ninth Circuit. Henry Johnson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12713

United States Court of Appeals

for the Ninth Circuit.

HENRY JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL

Transcript of Record

Appeal from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12713

United States Court of Appeals

for the Ninth Circuit.

HENRY JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL Transcript of Record

Appeal from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States District Court for the Northern District of California, Southern Division

No. 28995-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY JOHNSON,

Defendant.

PLAINTIFF'S REQUEST FOR ADMISSIONS

To: Reed M. Clarke, Attorney at Law, 1355 Ellis Street, San Francisco, California.

For the purpose of this action only, pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, within ten (10) days after service of this request plaintiff requests the defendant to admit the genuineness of the documents described and exhibited herewith, if any, and to admit the truth of the following relevant matters of fact:

1. That at all times material to this action defendant was the landlord of certain controlled housing accommodations, more particularly described and set forth in Schedule A attached to Plaintiff's Complaint, which schedule is by reference incorporated herein.

2. That the items in said schedule truthfully and correctly designate the names of the tenants who occupied the designated housing accommodations.

3. That the items in said schedule truthfully and correctly designate the periods said tenants occupied said accommodations.

4. That the items in said Schedule A truthfully and correctly designate the rentals collected from said tenants.

5. That said schedule truthfully and correctly designates the registered legal rents in force for the indicated housing accommodations for the periods of time referred to in request No. 3.

Dated this 13th day of September, 1949.

/s/ REUEL K. YOUNT,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed September 15, 1949.

[Title of District Court and Cause.]

DEFENDANT'S ADMISSIONS

Pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, the undersigned, attorney for the above-named defendant, hereby makes the following admissions, to wit:

1. Admits that at all times material to this action, defendant was the landlord of the housing accommodations mentioned in plaintiff's complaint.

2. Admits items in Schedule "A" truthfully and correctly designate the names of the tenants who occupied the designated housing accommodations.

3. Admits that items in said Schedule "A" truly and correctly designate the periods said tenants occupied said accommodations.

4. Denies that the items in said Schedule "A" truthfully, and/or correctly designate the rentals collected from the said tenants.

5. Admits that the said schedule truthfully and correctly designates the registered legal rents in force for said housing accommodations.

Dated: September 19th, 1949.

/s/ REED M. CLARKE,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 22, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION; POINTS AND AUTHORITIES; MOTION FOR SUMMARY JUDGMENT

Notice of Motion

To the Above-Named Defendant and His Attorney, Reed M. Clarke:

You Will Please Take Notice that the undersigned will move this Court at the United States

Post Office Building, San Francisco, California, on this 14th day of November, 1949, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, for entry of Summary Judgment in this cause.

Points and Authorities

1. Rule 56, Federal Rules of Civil Procedure.

2. In Shreffler v. Bowles, 153 F. 2nd 1 (1946); (Certiorari denied, 66 S. Ct. 1366), the Court stated:

> "The salutary purpose of Rule 56 is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present any substantial question for determination. Flimsy or transparent charges or allegations are insufficient to sustain a justiciable controversy requiring the submission thereof. The purpose of the rule is to permit the trier to pierce formal allegations of facts in pleadings and grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial."

(At page 3; footnote omitted.)

See also, Bowles v. Batson, 61 F. Supp. 839 (1945), aff'd. 154 F. 2nd 566 (1946).

Motion for Summary Judgment

Plaintiff moves the Court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment in Plaintiff's behalf and against Defendant herein.

If Summary Judgment is not rendered in Plaintiff's behalf upon the whole case, or for all the relief asked, and if the Court rule that a trial is necessary, let the Court on the hearing of the Motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear not substantially controverted and order such further proceedings in the action as are just.

This Motion is based upon the following papers and documents filed herein:

(a) Plaintiff's Complaint.

(b) Plaintiff's Request for Admissions.

(c) Defendant's Answer to Plaintiff's Request for Admissions.

It appears therefrom that this action was commenced by the Government of the United States on or about July 7, 1949, by filing a Complaint for Injunction, Restitution and Treble Damages with the Clerk of this Court.

It further appears that personal service was had upon defendant by the United States Deputy Marshal on or about July 12, 1949.

It further appears therefrom that on or about September 15, 1949, Plaintiff served a Request for Admissions on Defendant herein by serving a copy of said Request on his attorney, Reed M. Clarke, by mail, together with a copy of an Affidavit of Service by Mail, copies of which are on file with the Clerk of this Court.

It further appears that on or about September 19, 1949, Defendant filed his Answer to Plaintiff's Request for Admissions.

In answer to Plaintiff's Request for Admissions, Defendant admits that the items set forth in Schedule A attached to Plaintiff's Complaint truthfully and correctly designate the names of the tenants who occupied the designated housing accommodations, the periods said tenants occupied said accommodations, and the legal maximum rents in force for said housing accommodations during said periods.

Defendant, however, denies that the items in said Schedule A truthfully and correctly designate the rentals collected from said tenants.

Defendant has therefore admitted all material allegations of Plaintiff's Complaint save the amount of rents demanded and received from the said tenants for the said housing accommodations for the periods indicated.

In this connection, Plaintiff submits herewith and incorporates as a part hereof, the attached affidavits of the following tenants designated in Schedule A attached to Plaintiff's Complaint:

Pauline Henderson .... Room #1
Wilbert Guyden .... Room #2
Lester Houston .... Room #2
Leslie Houston .... Room #3
Mrs. Tillie Robinson .... Room #4
Riley Samuel .... Room #4
Robert Castle .... Room #6
Mrs. Willie Williams .... Room #7

The aforesaid affidavits of the tenants set forth the periods of time of their occupancy of the said housing accommodations, the amount of rents demanded and received by the Defendant, and the legal maximum rents in force during the periods of their occupancy. The aforesaid affidavits set forth the fact that evidence in the form of receipts showing payment of rents in excess of the legal maximum rents for said housing accommodations is now in the possession of the San Francisco Regional Office of the Housing Expediter.

Plaintiff therefore submits that by reason of the aforesaid admissions of the Defendant in his reply to Plaintiff's Request for Admissions, and by reason of the attached affidavits of each of the tenants concerned with respect to the amount of rents demanded and received by the Defendant in excess of the legal maximum rent for the subject housing accommodations during said periods of occupancy, there remains no substantial question of fact to be adjudicated by this Court.

Plaintiff further submits that Defendant's admissions and the aforesaid affidavits permit of no other conclusion than that the Defendant overcharged the said tenants designated in Exhibit A appended to the Plaintiff's within and foregoing Complaint for the periods of tenancy designated therein.

Wherefore, pursuant to Rule 56 of the Federal Rules of Civil Procedure as amended, Plaintiff prays that judgment shall be rendered forthwith on its behalf as the Pleadings, Request for Admissions and Defendant's Answer thereto, on file, together with supporting Affidavits, show conclusively that there remains no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law as prayed for in Plaintiff's Complaint.

Dated this 27th day of October, 1949.

/s/ RAYMOND J. FOX,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF PAULINE HENDERSON

State of California,
City and County of San Francisco—ss.

Pauline Henderson, being first duly sworn, deposes and says:

1. That she occupied the housing accommodations known as #1, 1495 O'Farrell Street, San Francisco, California, from on or about October 7, 1946, to on or about February 14, 1949.

2. Your affiant further states that during the

period from on or about October 7, 1946, to on or about December 15, 1947, she made payment of rent to Henry Johnson, Defendant, in the amount of $10.00 per week; and from on or about December 15, 1947, to on or about February 14, 1949, in the amount of $8.00 per week.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: October 7, 1946, until February 14, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $5.50 per week.

5. Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amounts as indicated in Item 2 above for the periods indicated are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ PAULINE LEE HENERSON.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF WILBERT GUYDEN

State of California,
City and County of San Francisco—ss.

Wilbert Guyden, being first duly sworn, deposes and says:

That he occupied the housing accommodations known as Room 2, 1493 O'Farrell Street, San Francisco, California, from on or about March 2, 1947, until on or about June 18, 1949.

Your affiant further states that during the period from on or about March 2, 1947, until on or about June 18, 1949, he made payment of rent to Henry Johnson, Defendant, in the amount of $8.00 per week.

Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: March 2, 1947, until June 18, 1949.

Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $6.00 per week.

Your affiant further states that from June 18, 1949, to date he has made payment of rent to Henry Johnson, Defendant, in the amount of $8.00 per week and continues to pay this amount.

Dated this 26th day of October, 1949.

/s/ WILBERT GUYDEN.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER HOUSTON

State of California,
City and County of San Francisco—ss.

Lester Houston, being first duly sworn, deposes and says:

1. That he occupied the housing accommodations known as Room #2, 1495 O'Farrell Street, San Francisco, California, from on or about August 8, 1947, to on or about May 7, 1949.

2. Your affiant further states that during the period from on or about August 8, 1947, to on or about May 7, 1949, he made payment of rent to Henry Johnson, Defendant, in the amount of $40.00 per month.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: August 8, 1947, to on or about May 7, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $12.00 per month.

5. Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amount of $40.00 per month for the period from August 8, 1947, to on or about May 7, 1949, are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ LESTER HOUSTON.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF LESLIE HOUSTON

State of California,
City and County of San Francisco—ss.

Leslie Houston, being first duly sworn, deposes and says:

1. That she occupied the housing accommodations known as Room #3, 1495 O'Farrell Street, San Francisco, California, from on or about September 3, 1947, until on or about May 7, 1949.

2. Your affiant further states that during the period from on or about September 3, 1947, until on or about May 7, 1949, she made payment of rent to Henry Johnson, Defendant, in the amount of $10.00 per week.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: September 3, 1947, until on or about May 7, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $5.00 per week.

5. Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amount of $10.00 per week for the period from September 3, 1947, until on or about May 7, 1949, are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ LESLIE HOUSTON.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF TILLIE ROBINSON

State of California,
City and County of San Francisco—ss.

Mrs. Tillie Robinson, being first duly sworn, deposes and says:

1. That she occupied the housing accommodations known as Room No. 4 at 1495 O'Farrell Street, San Francisco, California, from on or about October 1, 1946, to on or about July 1, 1949.

2. Your affiant further states that during the period from on or about October 1, 1946, to on or about November 1, 1946, she paid $40.00 per month; from November 1, 1946, to on or about December 31, 1946, she paid $7.00 per week; from January 1, 1947, to on or about June 15, 1947, she paid $8.00 per week; from November 1, 1947, to on or about March 1, 1948, she paid $7.00 per week; from March 1, 1948, to on or about April 1, 1948, she paid $40.00 per month; from April 1, 1948, to on or about July 1, 1949, she paid $32.00 per month.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: October 1, 1946, until July 1, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was $4.50 per week at the time weekly payments were made, and $8.00

per month at the time when monthly payments were made.

5. Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amounts as indicated in Item 2 above for the periods indicated are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ MRS. TILLIE ROBINSON.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF RILEY SAMUEL

State of California,
City and County of San Francisco—ss.

Riley Samuel, being first duly sworn, deposes and says:

That he occupied the housing accommodations known as Room 4, 1493 O'Farrell Street, San Francisco, California, from on or about June 2, 1947, until on or about June 2, 1949.

Your affiant further states that during the period from on or about June 2, 1947, until on or about

June 2, 1949, he made payment of rent to Henry Johnson, Defendant, in the amount of $32.00 per month.

Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: June 2, 1947, until June 2, 1949.

Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $24.00 per month.

Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amount of $32.00 per month for the period from June 2, 1947, until June 2, 1949, are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ RILEY SAMUEL.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT CASTLE

State of California,
City and County of San Francisco—ss.

Robert Castle, being first duly sworn, deposes and says:

1. That he occupied the housing accommodations known as Room #6, 1493 O'Farrell Street, San Francisco, California, from on or about February 18, 1949, until on or about June 24, 1949.

2. Your affiant further states that during the period from on or about February 18, 1949, until on or about June 24, 1949, he made payment of rent to Henry Johnson, Defendant, in the amount of $10.00 per week; receipts available.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: February 18, 1949, until June 24, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $6.00 per week.

Dated this 26th day of October, 1949.

/s/ ROBERT CASTLE.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is offi-

cially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

[Title of District Court and Cause.]

AFFIDAVIT OF MRS. WILLIE WILLIAMS

State of California,
City and County of San Francisco—ss.

Mrs. Willie Williams, being first duly sworn, deposes and says:

1. That she occupied the housing accommodations known as No. 7, 1495 O'Farrell Street, San Francisco, California, from on or about August 13, 1948, until on or about June 17, 1949.

2. Your affiant further states that during the period from on or about August 13, 1948, until on or about June 17, 1949, she made payment of rent to Henry Johnson, Defendant, in the amount of $8.00 per week.

3. Your affiant further states that Henry Johnson, Defendant, did demand and receive the aforesaid rents throughout the period of your affiant's occupancy, to wit: August 13, 1948, until on or about June 17, 1949.

4. Your affiant further states that the legal maximum rent for the aforesaid housing accommodations occupied by your affiant was at all times material to this action $5.50 per week.

5. Your affiant further states that all available receipts given by Henry Johnson, Defendant, showing payment of rent in the amount of $8.00 per week for the period from August 13, 1948, until June 17, 1949, are now in the possession of the San Francisco Regional Office of the Housing Expediter.

Dated this 26th day of October, 1949.

/s/ MARY WILLIAMS.

/s/ MRS. WILLIE WILLIAMS.

Subscribed and sworn to before me this 26th day of October, 1949.

/s/ RAYMOND J. FOX.

The person whose name is subscribed above is officially designated as being authorized to administer oaths pursuant to authority of P.L. 31, 81st Cong. (14 Fed. Reg. 2709).

Affidavit of service by mail attached.

[Endorsed]: Filed November 1, 1949.

United States District Court for the Northern District of California, Southern Division
No. 28995-G

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY JOHNSON,
Defendant.

PRE-TRIAL ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The above matter having come regularly on for hearing on Plaintiff's Motion for Summary Judgment on November 21, 1949, the Honorable Judge Louis E. Goodman presiding, Plaintiff being represented by his counsel, Reuel K. Yount, and Defendant being represented by his counsel, Reed M. Clarke, and the Court having examined the pleadings and having heard arguments of counsel, issues the following:

Pre-Trial Order

It Is Hereby Ordered that there remaining no material issues in this matter save the amount of rents actually collected by the Defendant from the various tenants, at the time of trial evidence will be taken solely on this point, since the names of the tenants, periods of occupancy, and legal maximum rents are admitted by the Defendant.

Dated this 9th day of December, 1949.

/s/ LOUIS E. GOODMAN,
Federal District Judge.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

DESIGNATION OF SUPPLEMENTAL RECORD ON APPEAL

To the Clerk of the above-entitled Court and to Henry Johnson, the Defendant above named, and to Reed M. Clarke, his attorney:

The plaintiff, United States of America, having heretofore received a copy of defendant's designation of contents of record on appeal, does hereby designate the following additional portions of the record to be contained in the record on appeal:

1. Plaintiff's Request for Admissions filed on or about September 15, 1949.

2. Defendant's Admissions filed on or about September 19, 1949, in response to said Request.

3. Notice of Motion, Points and Authorities, and Motion for Summary Judgment, with affidavits thereto attached filed by plaintiff November 1, 1949.

4. Pre-Trial Order entered December 9, 1949, on said Motion for Summary Judgment.

5. Documents received in evidence at trial May 12, 1950, marked: "Defendant's Exhibit A," consisting substantially of Registration Statements of the housing accommodations involved, and reciting orders of the Rent Director of the San Francisco Rent Defense Area, of the dates October 7, 1946, and September 7, 1949.

6. This designation of supplemental record on appeal.

Dated this 9th day of July, 1951.

/s/ SIDNEY FEINBERG,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 10, 1951.

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the supplemental record on appeal herein as requested by the attorney for the appellee:

Plaintiff's request for admissions.

Defendant's admissions.

Notice of Motion, Points and Authorities and Motion for Summary Judgment with affidavits.

Pre-trial order on Plaintiff's Motion for Summary Judgment.

Defendant's Exhibit "A."

Designation of supplemental record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 11th day of July, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12713. United States Court of Appeals for the Ninth Circuit. Henry Johnson, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Received: July 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

6. This designation of supplemental record on appeal.

Dated this 9th day of July, 1951.

/s/ SIDNEY FEINBERG,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 10, 1951.

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

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Plaintiff's request for admissions.

Defendant's admissions.

Notice of Motion, Points and Authorities and Motion for Summary Judgment with affidavits.

Pre-trial order on Plaintiff's Motion for Summary Judgment.

Defendant's Exhibit "A."

Designation of supplemental record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 11th day of July, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12713. United States Court of Appeals for the Ninth Circuit. Henry Johnson, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Received: July 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12741

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER W. GRAMER, Claimant of 213 BOTTLES, more or less, etc., and Claimant of 143 Bottles, more or less, of an article of drug, etc.,

Appellee.

Transcript of Record

Appeal from the United States District Court, Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12741

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER W. GRAMER, Claimant of 213 BOTTLES, more or less, etc., and Claimant of 143 Bottles, more or less, of an article of drug, etc.,

Appellee.

Transcript of Record

Appeal from the United States District Court, Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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NAMES AND ADDRESSES OF PROCTORS

J. CHARLES DENNIS,

1017 U. S. Court House,
Seattle, Washington,

Proctor for Appellant.

TODD, HOKANSON & WHITE,

682 Dexter Horton Building,
Seattle, Washington,

Proctors for Appellee.

In The District Court of the United States for the Western District of Washington, Northern Division

No. 15432

F.D.C. No. 28679

UNITED STATES OF AMERICA,

Libelant,

vs.

143 BOTTLES, More or Less, of an Article of Drug Labeled in Part: "4 FLUID OUNCES GRAMER'S SULGLY-MINOL, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," Together With 200 Leaflets, More or Less, Entitled: "Arthritis—Hundreds Claim Its Grip Broken," and 200 Leaflets, More or Less, Entitled: "A Light Should Not Be Hidden,"

Respondent.

LIBEL OF INFORMATION

To The Honorable Judges of the United States District Court for The Western District of Washington.

Now comes the United States of America, by J. Charles Dennis, United States Attorney for the Western District of Washington, and shows to the Court:

I.

That this libel is filed by the United States of America and prays seizure and condemnation of a

certain article of drug, as hereinafter set forth, in accordance with the Federal Food, Drug and Cosmetic Act, (21 U.S.C. 301 et seq.).

II.

That Walter W. Gramer shipped in interstate commerce from Minneapolis, Minnesota, to Seattle, Washington, via Consolidated Freightways, Inc., on or about October 15, 1949, an article of drug consisting of 143 Bottles more or less, labeled in part: "4 Fluid Ounces Gramer's Sulgly-Minol a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," together with the accompanying leaflets: Approx. 200, more or less, entitled "Arthritis—Hundreds Claim Its Grip Broken," and 200, more or less, entitled "A Light Should Not Be Hidden."

III.

That the aforesaid article was Misbranded in interstate commerce, within the meaning of said Act, 21 U.S.C. Sec. 352(a) in that the label statement "for the treatment of muscular pains, apply to soles of feet before retiring" and the statements appearing in the accompanying leaflets are false and misleading in this, that such statements represent and suggest that the article is effective as a treatment, cure and preventive for rheumatism and arthritic conditions and as a treatment for boils and acne, whereas, said article is not effective as a treatment, cure and preventive for rheumatism and arthritic conditions and is not effective as a treatment for boils and acne.

IV.

That the aforesaid article is in the possession of Dolan's Vital Foods, 1308 South Third Street, Mount Vernon, Washington, or elsewhere within the jurisdiction of this Court.

V.

That by reason of the foregoing, the aforesaid article is held illegally within the jurisdiction of this court, and is liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C., 334.

Wherefore, libellant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of said article and grant libellant the costs of this proceeding against the claimant herein; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libellant have such other and further relief as the case may require.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN F. DORE,
Assistant United States
Attorney.

United States of America,
Western District of Washington,
Northern Division—ss.

John F. Dore, being first duly sworn, on oath deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the Western District of Washington; that the facts set forth in the foregoing libel of condemnation are true as he verily believes; that he makes this verification for the reason that he is authorized to bring this libel by the Federal Security Agency, and that he has prepared the foregoing libel and makes the allegations therein contained upon information furnished him by the Federal Security Agency of the United States.

/s/ JOHN F. DORE,

Subscribed and sworn to before me this 10th day of January, 1950.

[Seal] /s/ LEE L. BRUFF,
Deputy Clerk, United States District Court, Western District of Washington.

[Endorsed]: Filed January 10, 1950.

[Title of District Court and Cause.]
No. 15432
F. D. C. No. 28679

ANSWER

Comes now Walter W. Gramer, claimant herein, and for answer to the United States of America libel of information, admits, denies and alleges as follows:

I.

Answering paragraph I thereof, claimant admits that the libel was filed by the United States of America and that said libel prays seizure and condemnation of a certain article of drug, but denies that said libel and seizure are in accordance with the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.).

II.

Answering paragraph II thereof, claimant admits the same.

III.

Answering paragraph III thereof, claimant denies the same and each and every allegation therein contained.

IV.

Answering paragraph IV, claimant admits that the articles therein mentioned were in the possession of the persons alleged, but denies that they are now in the possession of said persons.

V.

Answering paragraph V, claimant denies the

same and each and every allegation therein contained.

For further answer and affirmative defense to said libel of information, claimant alleges:

I.

The issues raised by the libel were adjudicated in favor of the claimant in an action entitled "United States vs. Walter W. Gramer," Criminal Cause No. 7984 in the District Court of the United States in and for the District of Minnesota, Fourth Division. The described action was dismissed after a trial before the Honorable Matthew M. Joyce, sitting without a jury, on or about April 6, 1949. All of the issues raised in the libel in the instant case were adjudicated in claimant's favor in the described action in Minnesota.

Wherefore, having fully answered United States of America's libel of information, claimant prays that the libel of information herein be dismissed with costs.

TODD, HOKANSON & WHITE,

/s/ RUSSELL V. HOKANSON,

Attorneys for Claimant.

United States of America,
Western District of Washington,
Northern Division—ss.

Russell V. Hokanson, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for claimant in the above action and that

he makes this verification for and on behalf of said claimant, being authorized so to do; that he has read the within and foregoing answer, knows the contents thereof and believes the same to be true.

/s/ RUSSELL V. HOKANSON,

Subscribed and sworn to before me this 15th day of May, 1950.

/s/ STUART W. TODD,

Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1950.

United States District Court, Western District of Washington, Northern Division

No. 15426
F.D.C. No. 28497

UNITED STATES OF AMERICA,
Libelant,

vs.

213 BOTTLES, More or Less, and 10 BOTTLES, More or Less, of an Article of Drug Labeled in Part: "4 FLUID OUNCES GRAMER'S SULGLY-MINOL, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," Together with the Following Leaflets: Approximately 1000 Leaflets Entitled "Arthritis — Hundreds Claim Its Grip Broken," and Approximately 1000 Leaflets Entitled "A Light Should Not Be Hidden,"
Respondent.

LIBEL OF INFORMATION

To The Honorable Judges of the United States District Court for The Western District of Washington.

Now comes the United States of America, by J. Charles Dennis, United States Attorney for the Western District of Washington, and shows to the Court:

I.

That this libel is filed by the United States of America and prays seizure and condemnation of a

certain article of drug, as hereinafter set forth, in accordance with the Federal Food, Drug and Cosmetic Act, (21 U.S.C. 301 et seq.).

II.

That Walter W. Gramer shipped in interstate commerce from Minneapolis, Minnesota, to Seattle, Washington, via Consolidated Freightways, on or about October 17, 1949, and November 22, 1949, an article of drug consisting of 213 bottles, more or less, and 10 bottles, more or less, labeled in part: "4 Fluid Ounces Gramer's Sulgly-Minol, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," together with the following leaflets: Approximately 1000 leaflets entitled "Arthritis—Hundreds Claim Its Grip Broken," and approximately 1000 leaflets entitled "A Light Should Not Be Hidden."

III.

That the aforesaid article was Misbranded in interstate commerce, within the meaning of said Act, 21 U.S.C., 352(a) in that the label statement and the statements in the above-entitled leaflets are false and misleading as the article is not effective as a treatment, cure and preventive for rheumatism and arthritic conditions and is not effective as a treatment for boils and acne.

IV.

That 213 bottles, more or less, of the aforesaid article are in the possession of Dr. McCormick's Natural Foods, 1918 Third Avenue, Seattle, and 10

bottles, more or less, of the aforesaid article are in the possession of Dr. McCormick's Natural Foods, 1313 Third Avenue, Seattle, together with the following leaflets: Approximately 1000 leaflets entitled "Arthritis—Hundreds Claim Its Grip Broken," and approximately 1000 leaflets entitled "A Light Should Not Be Hidden."

V.

That by reason of the foregoing, the aforesaid article is held illegally within the jurisdiction of this court, and is liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C., 334.

Wherefore, libelant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of said article and grant libelant the costs of this proceeding against the claimant herein; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libelant have such other and further relief as the case may require.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

United States of America,
Western District of Washington,
Northern Division—ss.

John E. Belcher, being first duly sworn, on oath deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the Western District of Washington; that the facts set forth in the foregoing libel of condemnation are true as he verily believes; that he makes this verification for the reason that he is authorized to bring this libel by the Federal Security Agency, and that he has prepared the foregoing libel and makes the allegations therein contained upon information furnished him by the Federal Security Agency of the United States.

/s/ JOHN E. BELCHER,

Subscribed and sworn to before me this 3rd day of January, 1950.

[Seal] /s/ WALLACE W. PETERSON,
Deputy Clerk, United States District Court, Western District of Washington.

[Endorsed]: Filed January 3, 1950.

[Title of District Court and Cause.]

No. 15426

F.D.C. No. 28497

ANSWER

Comes now Walter W. Gramer, claimant herein, and for answer to the United States of America libel of information, admits, denies and alleges as follows:

I.

Answering paragraph I thereof, claimant admits that the libel was filed by the United States of America and that said libel prays seizure and condemnation of a certain article of drug, but denies that said libel and seizure are in accordance with the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.).

II.

Answering paragraph II thereof, claimant admits the same.

III.

Answering paragraph III thereof, claimant denies the same and each and every allegation therein contained.

IV.

Answering paragraph IV, claimant admits that the articles therein mentioned were in the possession of the persons alleged, but denies that they are now in the possession of said persons.

V.

Answering paragraph V, claimant denies the

same and each and every allegation therein contained.

For further answer and affirmative defense to said libel of information, claimant alleges:

I.

The issues raised by the libel were adjudicated in favor of the claimant in an action entitled "United States vs. Walter W. Gramer," Criminal Cause No. 7984 in the District Court of the United States in and for the District of Minnesota, Fourth Division. The described action was dismissed after a trial before the Honorable Matthew M. Joyce, sitting without a jury, on or about April 6, 1949. All of the issues raised in the libel in the instant case were adjudicated in claimant's favor in the described action in Minnesota.

Wherefore, having fully answered United States of America's libel of information, claimant prays that the libel of information herein be dismissed with costs.

TODD HOKANSON & WHITE,

/s/ RUSSELL V. HOKANSON,
Attorneys for Claimant.

United States of America,
Western District of Washington,
Northern Division—ss.

Russell V. Hokanson, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for claimant in the above action, and that

he makes this verification for and on behalf of said claimant, being authorized so to do; that he has read the within and foregoing answer, knows the contents thereof and believes the same to be true.

/s/ RUSSELL V. HOKANSON.

Subscribed and sworn to before me this 15th day of May, 1950.

[Seal] /s/ STUART W. TODD,

Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1950.

In The District Court of the United States for the Western District of Washington, Northern Division

No. 15426
F. D. C. No. 28497

UNITED STATES OF AMERICA,
Libelant,

vs.

213 BOTTLES, More or Less, and 10 BOTTLES, More or Less of an Article of Drug Labeled in Part: "4 FLUID OUNCES GRAMER'S SULGLY-MINOL, a Solution of Sulphur, Glycerine, Sulphurated Limes and Isopropyl Alcohol 6%," etc.
Respondent,

and

No. 15432
F. D. C. No. 28679

UNITED STATES OF AMERICA,
Libelant,

vs.

143 BOTTLES, More or Less, of an Article of Drug Labeled in Part: "4 FLUID OUNCES GRAMER'S SULGLY-MINOL, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," etc.
Respondent.

ORDER CONSOLIDATING CAUSES

These causes came on to be heard on motion of claimant, Walter W. Gramer, for an order consolidating them, and it appearing that they involve common questions of law and fact and that consolidation will reduce costs and delay,

It Is Ordered:

1. That the above-entitled actions be and they are hereby consolidated.

2. That the csonsolidated action shall carry the titles of both of the above causes, but shall be civil action No. 15426 and that the clerk shall make all entires of further proceedings under that cause number.

Done In Open Court this 22nd day of May, 1950.

/s/ JOHN C. BOWEN,
Judge.

Presented By:

/s/ RICHARD S. WHITE, of

TODD, HOKANSON & WHITE,
Attorneys for Claimant.

Approved by:

/s/ J. CHARLES DENNIS,
U. S. Attorney.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

No. 15426

MOTION TO STRIKE

To the Honorable Judges of the United States District Court for the Western District of Washington.

Now comes the United States of America, by J. Charles Dennis, United States Attorney for the Western District of Washington, and pursuant to amended Civil Rule 12(f) moves the Court to strike the Affirmative Defense in the Answers filed in this consolidated action.

Said defense is insufficient since the judgment of dismissal in a criminal case, where the burden of proof is "beyond a reasonable doubt," can not be res judicata in the instant consolidated action, where the burden of proof is "by a preponderance of the evidence."

/s/ J. CHARLES DENNIS,
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed June 5, 1950.

[Title of District Court and Cause.]

No. 15426

ORDER DENYING LIBELANT'S MOTION TO STRIKE

This matter having come on before the above-entitled court on libelant's motion to strike the affirmative defense in the answers filed in this consolidated action, and libelant being represented by J. Charles Dennis, United States Attorney, and Arthur Dickerman, Esquire, and claimant being represented by his attorneys, Todd, Hokanson & White, by Richard S. White, and briefs having been submitted by both counsel, and arguments having been heard by both counsel, and the court being fully advised in the premises,

Now, Therefore, It Is Ordered that libelant's motion to strike the affirmative defense in the answers filed in this consolidated action be and the same is hereby overruled and denied.

Done in open court this 28th day of August, 1950.

/s/ JOHN C. BOWEN,
Judge.

Approved by:

/s/ RICHARD S. WHITE, of
TODD, HOKANSON & WHITE,
Attorneys for Claimant.

Approved as to Form and Presentation Waived.

/s/ ARTHUR A. DICKERMAN,
Attorney for Libelant.

[Endorsed]: Filed August 28, 1950.

[Title of District Court and Cause.]

No. 15426

STIPULATION

It Is Hereby Stipulated by and between the United States of America, by its attorneys, J. Charles Dennis, United States Attorney, and John F. Dore, Assistant United States Attorney and Walter W. Gramer, claimant herein, by his attorneys, Todd, Hokanson & White and Richard S. White, that

1. The contents of the bottles of Gramer's Sulgly-Minol seized by the United States, as libelant in the above-captioned consolidated action, are identical in all material respects with the contents of the bottles of Gramer's Sulgly-Minol which were in issue and which are described in the information in Cause No. 7984-Crim. (F.D.C. No. 25586) United States District Court, District of Minnesota, Fourth Division, entitled "United States of America vs. Walter W. Gramer."

2. The chemical composition of the Sulgly-Minol described in paragraph 1 above is approximately as follows:

Total Sulphur....	10.84% — 1	lb. per gal.
Lime	4.77% — ½	lb. per gal.
Glycerine	5.68% — ½	lb. per gal.
Isopropyl Alcohol	6.30% — ½	lb. per gal.

p-H 10.4

Sulgly-Minol is compounded by putting elemental

sulphur and hydrated lime in Minneapolis City tap water, heating this mixture, allowing it to settle, thereafter decanting and adding glycerine and isopropyl alcohol to the decanted portion, and immediately bottling without filtration.

3. All labeling and literature, including bottle labels, circulars and pamphlets in issue in the above-captioned consolidated cause are in all material respects the same as those which were in issue in said Cause No. 7984.

4. Walter W. Gramer, claimant herein, is one and the same person as Walter W. Gramer, the defendant in the said Cause No. 7984. The certified copies of the information and judgment of dismissal in said Cause No. 7984, attached hereto and marked respectively "Exhibit A" and "Exhibit B," are true and correct copies of the information and judgment of dismissal filed in said Cause No. 7984. Subsequent to the filing of the information in said Cause No. 7984, Walter W. Gramer entered a plea of not guilty and after a trial on the merits of the issue of whether the drug was misbranded within the meaning of 21 U. S. C. 352(a), the United States District Court of Minnesota, Fourth Division, adjudged Walter W. Gramer not guilty of the crime charged by the said information, pursuant to which the judgment of dismissal, a copy of which is annexed hereto as "Exhibit B" was entered therein.

5. Attached hereto and marked "Exhibit C" and "Exhibit D" respectively are a copy of the leaflet "Arthritis—Hundreds Claim Its Grip Broken" and a copy of the leaflet "A Light Should Not Be Hidden." Said leaflets are referred to in the Libel of

Information filed in the instant cause. Said leaflets are a part of the labeling of the aforesaid Sulgly-Minol.

Dated this 28th day of August, 1950.

/s/ J. CLARK DENNIS,
United States Attorney.

/s/ ARTHUR A. DICKERMAN,
Attorney, U. S. Food and Drug Administration.

WALTER W. GRAMER,
Claimant, by

TODD, HOKANSON & WHITE,
/s/ RICHARD S. WHITE,

Proctors for Claimant.

EXHIBIT A

F. D. C. No. 25586

In the District Court of the United States for the District of Minnesota; Fourth Division

No. 7984 Crim.

UNITED STATES OF AMERICA

vs.

WALTER W. GRAMER

(21 U. S. C. 331 and 333)

Count I

The United States Attorney charges:

That Walter W. Gramer, an individual, trading

and doing business at Minneapolis, State of Minnesota, did, within the District of Minnesota, on or about April 16, 1948, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Minneapolis, State of Minnesota, for delivery to Eau Claire, State of Wisconsin, consigned to Fred J. Fasching, a number of bottles containing a drug;

That displayed upon said bottles, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was certain labeling, to wit, the following printed and graphic matter:

4 Fluid Ounces

Gramer's Sulgly-Minol

A Solution of Sulphur, Glycerine, Sulphurated Lime and Alcohol 1%

For External Use Only

For treatment of muscular pains, apply to soles of feet before retiring. Or add to bath water for sulphur bath. Add two tablespoons to one gallon of water for treatment of athlete's foot.

Compounded and Developed by
Walter W. Gramer
Minneapolis, Minnesota

Distributor Fred J. Fasching
1110 Birch Street, Eau Claire, Wis.

That accompanying said drug was additional la-

beling relating to said drug namely a number of circulars entitled "Arthritis Its Grip Broken" and "A Light Should Not Be Hidden." The said Walter W. Gramer shipped the said circulars to said Fred J. Fasching on or about May 15, 1948, as part of the same interstate transaction and distributional scheme, intending that they be placed with said drug and used together with it by said consignee. Said circulars were received by said consignee.

That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid, was misbranded within the meaning of 21 U. S. C. 352(a) in that the aforesaid labeling of said drug contained statements which represented and suggested that said drug when applied to the soles of the feet before retiring would be efficacious in the treatment of muscular pains, that said drug would be efficacious in the relief and in the treatment of arthritis, and that said drug would be efficacious in the treatment of boils, acne and ailments of a rheumatic nature, that said drug would relieve one from the pains of arthritis and rheumatism and that said drug would take stiffness and soreness out of one's legs and knees, which statements in said labeling were false and misleading in that said drug would not fulfill the promises of benefit stated and implied by said statements.

/s/ JOHN W. GRAFF,
United States Attorney for
the District of Minnesota.

[Endorsed]: Filed Nov. 30, 1948.

EXHIBIT B

In the District Court of the United States in and for the District of Minnesota, Fourth Division

Criminal Term Minutes

March Term, A.D. 1949 April 6, 1949

Wednesday morning.

Court opened pursuant to adjournment.

Present: Honorable Matthew M. Joyce, Judge.

(Before Joyce, J.)

No. 7984 Crim.

THE UNITED STATES

vs.

WALTER W. GRAMER

The above-entitled cause coming on this day for further trial to the Court, pursuant to adjournment, the following proceedings are had:

Mr. Hansen sums up the case to the Court in behalf of the plaintiff.

Mr. Logefeil sums up the case to the Court in behalf of the defendant.

Whereupon said action is duly submitted to the Court and after due and mature consideration, it is

Ordered and Adjudged: that said defendant, Walter W. Gramer, is not guilty as charged and that the Information herein be, and the same is hereby dismissed and the defendant discharged.

EXHIBIT C
Arthritis

Hundreds Claim Its Grip Broken
One Bottle Will Tell

- In June, 1940, two hundred letters, like the one enclosed, were mailed to people living within fifty miles of Wayzata, Minn., where the merits of "Sulgly-Minol" were first discovered, telling people of the marvelous results obtained by using "Sulgly-Minol" (Sulphur Solution) to obtain relief from Arthritis.

- Since that time, thousands of bottles have gone out to sufferers of this painful ailment. People who had given up hope of being well again (ranging from eighteen to eighty years of age) have been put back on their feet and can again live a normal and happy life. In many cases this was accomplished for the price of one bottle.

- If you are suffering from Arthritis or if you know someone who is, don't you agree that here is something to good to pass up? Many, many have thanked me sincerely from the bottom of their hearts, for telling them.

- By all means try "Sulgly-Minol" and tell others about it. It has certainly knocked Arthritis in my case and hundreds of others have claimed similar results.

- Attached is the letter used to introduce "Sulgly-Minol" (Sulphur Solution). Every word is true; please read it and pass it on.

- Full Instructions Are Given with Each Bottle.
- Simple—Inexpensive—Effective.

(Used Externally)

Copy of Original Letter

Dear Friend:

Do you have Arthritis? Have you a relative or friend that is suffering from this painful distressing ailment?

I have come across a simple remedy, which has ended my long search and battle, to rid myself of Arthritis. I had teeth pulled, tonsils out, serum shots, electric fever treatments, special built shoes, hot baths, pills and salves. The Arthritis withstood them all, and examinations in several of the best known clinics could detect nothing. Finally, I discovered Sulgly-Minol. Today, after seven months, I am more free of pain and soreness than at any time in twenty years. Can work ten hours a day, with nothing more than tired feet. Legs, hips, back, neck, and arms are practically free of pain and soreness. This has cost me less than six dollars.

This is all I did, and all you will have to to try Sulgly-Minol. Just rub it on the soles of both feet before going to bed. No matter where the Arthritis is, rub Sulgly-Minol on the bottom of the feet. A bottle will last about a month, and that will be enough to tell whether it will help or not. If it helps you should keep up the treatment for another

month, and after that, just as you feel. If my feet feel a little sore from too much activity I rub some on for a night or two, that is all there is to it.

Sulphur has been known for many years, as an effective treatment for boils, and acne. Often being taken as the old familiar, Sulphur and Molasses mixture. Also Sulphur baths have for centuries been taken by those suffering from ailments of a rheumatic nature. In my opinion, the benefits of sulphur are more surely, and completely obtained, through the use of Sulgly-Minol, applied to the soles of the feet. The results obtained through the use of this simple, inexpensive remedy have been acclaimed by many as a God-send.

If you want to try a bottle, just send your name and address to me, with remittance, and I will send a bottle. If you do not need it, tell some suffering friend or relative. Those of us who have, or have had Arthritis, know how hopeless our condition seems at times, and how discouraged we sometimes feel. Often I have asked the question, "Why can't something be done to help me?" I sincerely believe that here is something that will help people who are suffering from Arthritis, and want to tell as many as I can about it. I am sure you do too.

Sincerely yours,

/s/ WALTER W. GRAMER.

Price

4 oz. Bottle (about a month's supply) $2.00

EXHIBIT D

● A Light Should Not Be Hidden

Testimonials

• Below we give you a few of the many testimonials we have received from people who have been relieved from the pains of Arthritis and Rheumatism by using "Sulgly-Minol." The original copies of these letters are in our files and many more. Write these people if you care to; they will be only too glad to tell you what they know about "Sulgly-Minol."

One Bottle Will Tell

•

• Mr. Dennis Roberts, Bessemer, Michigan, Writes:

"I am improving right along, gaining strength in my legs, and am not troubled with constipation, and have no pain whatever. Am sending money for a dozen bottles as several have asked me to get some for them."

Mr. Roberts stated he had Arthritis for years; he also stated he was considered a hopeless cripple by folks of his community; today he claims he is leading a happy, normal life, and works his little farm again, thanks to "Sulgly-Minol."

•

• Albert H. Cherry, 453 East 6th St., New Richmond, Wisc., Writes:

"I am very glad if I have been able to help in any way, to assure the future supply of "Sulgly-Minol" to myself and others who might be suffering from

arthritis. The relief I have had from the use of 'Sulgly-Minol' is ample payment for anything I can do to further its production."

•

• Mr. Cecil E. Biesecker, R. 5, Eau Claire, Wisc., Writes:

"I have been using it for several months and it surely has helped my case. It takes the stiffness and soreness out of my legs and knees so I can get up and down much easier. I have told several of my friends suffering from arthritis and you will be hearing from them."

•

• Mrs. Oscar Runholt, Cottonwood, Minnesota:

" 'Sulgly-Minol' has helped me so much after being down for eight months with arthritis. People ask me what I've done, I look so good again."

•

• Mrs. Riley Bugh, 1014 N. Jefferson St., Hartford City, Ind., Writes:

"I am happy to say it has done me a world of good, and don't want to be without it. Have recommended it to several of my friends. I can sleep all night now without my knees aching and that is something I haven't done for nearly a year, also the soreness and stiffness are leaving. Thanks a million for your wonderful remedy."

•

• Mrs. Catherine E. Stephenson, 601 E. Water St., Northfield, Minn., Writes:

"I wish to express my thanks to you for your

wonderful arthritis remedy, 'Sulgly-Minol.' My hands were getting so bad I could hardly use them; part of a bottle of 'Sulgly-Minol' almost cured them. My legs are stronger and do not get tired as they did. My nephew is using it for athlete's foot and is improving more and more every day. A sister has been using it for about two weeks and it has helped a lot already. I am telling everyone I see about it, as I think it is a miracle."

•

So we could go on and on, but we feel that the above letters prove beyond a doubt that "Sulgly-Minol" has broken the grip of arthritis, in many cases. Here is what hundreds of people claim they have been hoping and praying for—simple, inexpensive relief from the pains of arthritis.

By All Means Try "Sulgly-Minol"

In writing any of the above, please enclose a self-addressed, stamped envelope.

Partial List
Users of Sulgly-Minol

(Solution of Sulphur)

By All Means Try Sulgly-Minol

Following Are the Names and Addresses of Some of the People Who Have Used "Sulgly-Minol"

We Have Many More. Write Them for
Their Opinion as to Its Merits.
Their Letters Have Come to Us Unsolicited

Mr. Denis Roberts, Route 1, Box 58 B, Bessemer, Michigan.

Mrs. Edna A. Hargrave, 627½ 7th Avenue, Baraboo, Wisconsin.

Miss Bertha Lindemann, 6007 Burwood Ave., Los Angeles 12, Calif.

Cecil E. Beisecker, R.R. No. 5, Eau Claire, Wisconsin

Elias Linbakka, 524 Lambart Street, Negaunee, Michigan

Mrs. Goss, Care Ivey's Delicatessen, Nicollet Avenue, Minneapolis, Minn.

Mrs. Catherine E. Stephenson, 601 E. Water St., Northfield, Minn.

Mrs. Haydt Ammans, 1325 Middlebrook Pike, Knoxville 16, Tenn.

Mrs. Arlene Johnson, 920 Carney Blvd., Marinette, Wisconsin

Wm. H. Zimmerman, Whittemore, Iowa

Mrs. John Bliese, 915 N. 3rd Ave., Wausau, Wis.

Mrs. Katherine Ernst, Roscoe, So. Dakota

Clem Niebur, Hampton, Minnesota

Mrs. Hans Vangen, 213—3rd St. S.W., Minot, N. Dakota

Mrs. F. E Christensen, 319—4th St., Manistee, Mich.

Mrs. Hartlet, Norwood, Minn.

Josephine Wochtritt, 102 N. 2nd Ave., Wausau, Wisconsin

Bessie Shipman, 2711 Summit St., Toledo, Ohio

Mr. J. D. Mathis, 6 Orleans, Memphis 3, Tennessee

John Johnson, 519 Taylor St., Flint, Michigan

Katie Fre Schmidt, 72 Society St., Charleston 8, So. Carolina

Mr. F. O. Wendler, R. 1, Monett, Missouri

Sam Lee, New Folden, Minnesota

William Wolter, 5030 George St., Chicago 41, Illinois

Mrs. G. E. Gruinuse, 365 Ill. Ave., Galesburg, Illinois

Will Hale, Wisconsin Dells, Wisconsin

Mrs. Martha M. Cratty, 212 S. 4th St., Vincennes, Indiana

Mrs. Alva M. Overman, R. d. No. 5, Hillsboro, Ohio

Cora Morrow, 4852 Calumet Ave., Chicago 15, Illinois

Mrs. H. L. Eickmeyer, 1305 Columbus Ave., Bay City, Michigan

J. R. Michaels, R. R. 1, Watertown, So. Dakota

Mrs. Louise Ahrens, P.O. Box 4, Chaldron, Nebraska

Wm. H. Wilkining, Moro, Illinois

Bert Hayer, 1013 W. 25th St., Fort Worth, Texas

Stephan Galinatz, Box 35, Wakefield, Michigan

Mrs. Gusta Johnson, R. 1, Douglas, No. Dakota

Mrs. Albert Maggs, 504 So. Jefferson St., Muncie, Indiana

Mrs. Marge A. C. Oldroyd, Thorp, Wisconsin

Anna Jauanroich, Box 382, Carson Lake, Minnesota

Letha Norwood, 2036 N. Quaker, Tulsa, Oklahoma

Mrs. Edgar Smith, 623 So. Main St., Pendleton, Oregon

Mrs. Helen Brandt, 400 W. 7th St., Morris, Minnesota

Edith Rohrer, 2770 S. James Place, Altadena, California

Mrs. John Erickson, c/o Cardiff, Pierie, Idaho

Hanna J. Rasmussen, E. Stanwood, Washington

Mrs. Trian Foley, c/o 1021 Morie Ave. So., St. Paul, Minnesota

Miss Marie Ratkovich, 3153 So. Harding Ave., Chicago 23, Illinois

In writing any of the above, please enclose a self-addressed, stamped envelope.

[Endorsed]: Filed August 30, 1950.

[Title of District Court and Cause.]

No. 15426

MOTION FOR SUMMARY JUDGMENT

Claimant, Walter W. Gramer, moves the court to enter, pursuant to Rule 56 of the Federal Rules of

Civil Procedure, a summary judgment in claimant's favor dismissing the action, on the ground that there is no genuine issue as to any material fact and that claimant is entitled to a judgment as a matter of law.

This motion is based upon:

(a) The pleadings on file in this action.

(b) Stipulation between the parties, acting through counsel, dated August 28, 1950, on file in this action.

TODD, HOKANSON & WHITE,

/s/ RICHARD S. WHITE,
Attorneys for Claimant.

Copy received Aug. 30, 1950.

[Endorsed]: Filed August 30, 1950.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 15426

UNITED STATES OF AMERICA,

Libelant,

vs.

213 bottles, more or less, and 10 bottles, more or less, of an article of drug labeled in part:
"4 Fluid Ounces Gramer's Sulgly-Minol, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl Alcohol 6%," etc.

Respondent,

and

UNITED STATES OF AMERICA,

Libelant,

vs.

143 bottles, more or less, of an article of drug labeled in part:
"4 Fluid Ounces Gramer's Sulgly-Minol, a Solution of Sulphur, Glycerine, Sulphurated Lime and Isopropyl 6%," etc.

Respondent.

ORDER GRANTING SUMMARY JUDGMENT AND DISMISSAL

This cause came on to be heard on motion of claimant Walter W. Gramer for a summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and libelant being represented by J. Charles Dennis, United States Attorney, and claimant being represented by his attorneys, Todd, Hokanson & White, by Richard S. White, and the court having considered the pleadings in the action and the stipulation referred to in claimant's motion, and it appearing from said stipulation that the issues raised by the libelant in the above-entitled consolidated cause were adjudicated in favor of the claimant after a trial on the merits in an action entitled "United States of America vs. Walter W. Gramer," Criminal Cause No. 7984 in the District Court of the United States in and for the District of Minnesota, Fourth Division, and this court having heretofore and on the 28th day of August, 1950, entered its order denying libelant's motion to strike claimant's affirmative defense, and the court having concluded that claimant Walter W. Gramer has a complete legal defense to the above-entitled consolidated cause, and the court having found that there is no genuine issue as to any material fact, and having concluded that claimant Walter W. Gramer is entitled to judgment as a matter of law,

It Is Hereby Ordered, Adjudged and Decreed:

1. That claimant's motion for summary judgment be and the same is hereby granted.

2. That the above-entitled consolidated action be and the same is hereby dismissed on the merits.

Done in Open Court this 11th day of September, 1950.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ RICHARD S. WHITE, of
TODD, HOKANSON & WHITE,
Attorneys for Claimant.

Approved as to form only:

/s/ J. CHARLES DENNIS,
U. S. Atty.

[Endorsed]: Filed September 11, 1950.

[Title of District Court and Cause.]

No. 15426

NOTICE OF APPEAL

To Walter W. Gramer, Claimant, and to Todd, Hokanson & White, his attorneys; and to The Honorable John C. Bowen, Judge, and Millard P. Thomas, Clerk of the above-entitled Court:

You and each of you will please take notice that the libelant, United States of America, hereby appeals from that certain order entered on September 11, 1950, in the above-entitled consolidated cause, granting summary judgment and dismissal, hereby

appealing from the whole of said order of the court, and each and every part thereof, unto the United States Court of Appeals for the Ninth Circuit.

Dated this 20th day of October, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1950.

[Title of District Court and Cause.]

Nos. 15426 and 15432.

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the above-entitled court, do hereby certify that I am transmitting as the Apostles on Appeal in these causes all of the original papers in the file dealing with the above-entitled actions or proceedings, the same being the complete record on file in said causes; and that said original papers hereby transmitted constitute the apostles on appeal from that certain order granting summary judgment and dismissal filed and entered on September 11, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

Cause No. 15432

1. Libel of Information, filed Jan. 10, 1950.

2. Praecipe for process, filed Jan. 10, 1950.

3. Affidavit of Publication, filed Jan. 19, 1950.

4. Marshal's Return of Monition and Attachment, filed Jan. 27, 1950.

5. Claim of Walter W. Gramer, filed Jan. 31, 1950.

6. Stipulation Extending Time to Answer to March 1, 1950, filed Jan. 31, 1950.

7. Stipulation Extending Time to May 15, 1950, to answer, filed Apr. 10, 1950.

8. Answer of Claimant, filed May 16, 1950.

9. Claimant's Demand for Jury, filed May 18, 1950.

Cause No. 15426

1. Libel of Information, filed Jan. 3, 1950.

2. Praecipe for process, filed Jan. 3, 1950.

3. Affidavit of publication, filed Jan. 9, 1950.

4. Marshal's Return on Monition and Attachment, filed Jan. 10, 1950.

5. Claim of Walter W. Gramer, filed Jan. 31, 1950.

6. Stipulation extending time to answer to March 1, 1950, filed Jan. 31, 1950.

7. Stipulation extending time to answer to March 31, 1950, filed Feb. 28, 1950.

8. Stipulation extending time to answer to May 15, 1950, filed Mar. 31, 1950.

9. Answer of Claimant, filed May 16, 1950.

10. Claimant's Demand for Jury, filed May 16, 1950.

11. Claimant's Motion to Consolidate with Cause No. 15432, filed May 16, 1950.

12. Claimant's Note for Motion Calendar, filed May 16, 1950.

13. Order Consolidating Causes, filed May 22, 1950.

14. Libelants' Motion to Strike Affirmative Defense in Answers, filed June 5, 1950.

15. Brief in Support of Motion to Strike, filed June 21, 1950.

16. Notice of Hearing on Motion to Strike, filed Aug. 10, 1950.

17. Brief in Answer to Libelant's Motion to Strike Claimant's Affirmative Defense, filed Aug. 26, 1950.

18. Order Denying Libelant's Motion to Strike, filed Aug. 28, 1950.

19. Claimant's Motion for Summary Judgment, filed Aug. 30, 1950.

20. Note for Calendar, filed Aug. 30, 1950.

21. Stipulation Regarding Contents of Bottles, and Literature in Causes No. 15426 and 7984-Crim.

of District of Minnesota, Fourth Division, (Exhibit's Numbered "A," "B," "C" and "D" attached) filed Aug. 30, 1950.

22. Order Granting Summary Judgment and Dismissal, filed and entered Sep. 11, 1950.

23. Libelant's Notice of Appeal, filed Oct. 20, 1950.

24. Order Staying Enforcement of Judgment Pending Appeal, filed and entered Nov. 2, 1950.

25. Statement of Points on Appellant's Intention to Rely, filed Nov. 2, 1950.

26. Designation of Contents of Record on Appeal, filed Nov. 2, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of appellant for preparation of the apostles on appeal in this cause, to wit:

Notice of Appeal—$5.00 and that said amount has not been paid to me for the reason that the appeal is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 15th day of November, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12741. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Walter W. Gramer, Claimant of 213 Bottles, more or less, etc., and Claimant of 143 Bottles, more or less, of an article of drug, etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12741

UNITED STATES OF AMERICA,

Appellant,

vs.

213 BOTTLES . . . SULGLY-MINOL, ETC., and WALTER W. GRAMER,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant hereby states the points on which it intends to rely on appeal:

(1) The District Court erred in denying libelant's motion to strike the claimant's affirmative defense.

(2) The District Court erred in holding that the acquittal of the claimant, Walter W. Gramer, in a prior criminal proceeding under 21 U.S.C. 333 constituted a bar to the instant seizure and condemnation action under 21 U.S.C. 334.

(3) The District Court erred in granting the claimant's motion for summary judgment and in dismissing the instant consolidated proceedings.

Dated: November 14, 1950.

Respectfully submitted,

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 16, 1950.

No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

WALTER W. GRAMER,
Claimant of 213 Bottles, etc.
Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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Of Counsel.

BALLARD NEWS, SEATTLE, WASHINGTON -- 1/16/51 -- 45 COPIES

No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

WALTER W. GRAMER,
Claimant of 213 Bottles, etc.
Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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United States Attorney

VAUGHN E. EVANS,
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Of Counsel.

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MISCELLANEOUS

No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

WALTER W. GRAMER,
Claimant of 213 Bottles, etc.
Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

I

STATEMENT OF JURISDICTION

Under 21 U.S.C. 334(a), the District Court had jurisdiction over the libel for condemnation proceedings involved in this appeal.

Pursuant to 28 U.S.C. 1291, this Court has jurisdiction to review the decision of the District Court.

II

STATEMENT OF THE FACTS

This appeal involves two libel for condemnation proceedings that were instituted in the District Court of the United States for the Western District of Washington under the Federal Food, Drug, and Cosmetic Act. [21 U.S.C. 334(a)]. By order of that Court, the cases were consolidated since the articles proceeded against and the substantive charges are the same in both cases. (R. 18)

The Libels charge that the drug in question, Sulgly-Minol, is misbranded in violation of 21 U.S.C. 352(a) because its labeling suggests it is effective as a treatment for rheumatism, arthritic conditions, boils, and acne, whereas the drug is not effective for those purposes. (R. 4, 11).

In the Answers filed by the claimant-appellee, Walter W. Gramer, the substantive allegations of the Libels are denied, and the affirmative defense is raised that Mr. Gramer was acquitted in a prior criminal proceeding in the District Court of the United States for the District of Minnesota which involved the same product and the same charges of misbranding. (R. 7, 8, 14, 15).

The Government filed a Motion to Strike this

affirmative defense on the ground that a judgment of dismissal in a criminal case, where the burden of proof is "beyond a reasonable doubt", cannot be *res judicata* in the instant consolidated action, where the burden of proof is "by a preponderance of the evidence." (R. 19). This motion was denied by the District Court. (R. 20).

Thereafter, the parties entered into a Stipulation which sets forth (1) the composition of Sulgly-Minol, (2) the criminal information and the judgment of acquittal in the District of Minnesota, and (3) the leaflets which are a part of the labeling of the drug and which contain the representations of benefit to be derived from its use. (R 21-35). The Stipulation also declares that the drug and labeling under seizure here are in all material respects the same as the drug and labeling which were involved in the criminal prosecution in the District of Minnesota.

Subsequently, the claimant filed a Motion for Summary Judgment. (R. 35-6). This Motion was granted and the case ordered dismissed by the lower court on the ground that the claimant's acquittal in the prior criminal proceeding constitutes a complete legal defense in the instant cause. (R. 38-9).

III

STATUTORY PROVISIONS INVOLVED

Federal Food, Drug, and Cosmetic Act

"Section 502. *Misbranded drugs and devices* (21 U.S.C. 352)

A drug shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular."

"Section 301. *Prohibited acts* (21 U.S.C. 331)

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"Section 303. *Penalties — Violation of section 331* (21 U.S.C. 333)

(a) Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; . . ."

"Section 302. *Injunction proceedings — Jurisdiction of courts* (21 U.S.C. 332)

(a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, . . . to restrain violations of Section 301 . . ."

"Section 304. *Seizure — Grounds and jurisdicdiction* (21 U.S.C. 334)

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce . . . shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found; . . . "

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and

charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold:

PROVIDED, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under Section 404 or 505, be

introduced into interstate commerce, shall be disposed of by destruction."

IV

QUESTIONS INVOLVED

(1) Does an acquittal in a *criminal* proceeding under the Federal Food, Drug, and Cosmetic Act stand as a bar to a subsequent *libel for condemnation* suit under the same Act, where the parties, the drug, and the issues of misbranding are the same?

(2) Did the District Court err in denying the Government's Motion to Strike the Affirmative Defense?

(3) Did the District Court err in granting the Claimant's Motion for Summary Judgment?

V

SUMMARY OF ARGUMENT

A. *Introduction*

Appellee Gramer distributes a proprietary drug "Sulgly-Minol" which he represents as effective in the treatment, cure, and prevention of rheumatism, arthritis, boils, and acne. Through his literature, he offers relief from these conditions by rubbing Sulgly-Minol on the soles of both feet, before going to bed.

The Government charges this drug is misbranded because it has no such therapeutic value. Under the pleadings, these allegations must be accepted as true.

Mr. Gramer has twice been prosecuted in the District of Minnesota under the Federal Food, Drug, and Cosmetic Act for making interstate shipments of Sulgly-Minol similarly alleged to be misbranded. In the first prosecution in 1947, Mr. Gramer pleaded guilty. In the second prosecution, Mr. Gramer was acquitted in 1949 after a trial before the Court.

Three seizure actions of Sulgly-Minol similar to the instant proceedings have resulted in default decrees of condemnation and destruction.

In the instant consolidated seizure action, Mr. Gramer intervened as claimant and pleaded his acquittal in the second prosecution as an adjudication in his favor of all the issues raised in the seizure action.

The Lower Court granted Mr. Gramer's Motion for Summary Judgment on the ground that he has a complete legal defense.

B. *In Criminal Actions Under the Federal Food, Drug, and Cosmetic Act, the Government Must Prove Its Case "Beyond a Reasonable Doubt."*

It is settled that the Government's burden in criminal cases under this Act is to prove every alle-

gation of material fact "beyond a reasonable doubt."

C. *A Seizure Action Under the Federal Food, Drug, and Cosmetic Act is a Civil Suit where the Government's Burden of Proof is "By a Preponderance of the Evidence."*

Seizures cases under the Act are *in rem* proceedings, civil in nature.

In a seizure case, the burden upon the Government is to prove its allegations only "by a preponderance of the evidence," and not "beyond a reasonable doubt."

D. *An Acquittal in a Criminal Case Under the Federal Food, Drug, and Cosmetic Act Does Not Stand as a Bar to a Subsequent Seizure Case under that Act Based Upon the Same Misbranding Charge.*

Mr. Gramer, claimant-appellee, was acquitted in 1949 in a criminal prosecution based upon the same misbranding charge that is made here. However the shipment of Sulgly-Minol in the criminal case was made in 1948, whereas the shipments of Sulgly-Minol in the present case were made in 1949.

The acquittal in the criminal case cannot be invoked as *res judicata* in the instant civil case because of the difference in burden of proof.

The acquittal in the criminal case cannot be invoked as *prior jeopardy* here for two reasons:

(1) the defense of prior jeopardy or double jeopardy may be raised only in a criminal case whereas here we have a civil case, and (2) the shipment of Sulgly-Minol involved in the criminal case is not the same as the shipments of the Sulgly-Minol now under seizure — since each shipment of a misbranded drug constitutes a separate offense, there can be no basis for holding that the present civil suit puts Mr. Gramer in jeopardy again for the same alleged offense for which he was prosecuted in the criminal case.

The Lower Court relied upon *Coffey v. United States*, 116 U.S. 436 (1886) in granting claimant's Motion for Summary Judgment. That case enunciated the rule that the Government could not maintain a civil suit to forfeit property because of an alleged offense against the liquor laws, when the owner of the property had been prosecuted and acquitted in a prior criminal proceeding. The theory of this ruling appears to have been that the forfeiture of property is a punishment, and that a person may not be twice punished for the same offense.

More recent Supreme Court decisions have for practical purposes delimited the scope of the *Coffey* case to the point of extinction.

In *Various Items of Personal Property et al v. United States*, 282 U. S. 577 (1931), the Court held that a prior conviction for defrauding the Government of taxes on distilled spirits did not bar a civil action to forfeit the distillery and other property which the defendants had used in so defrauding the Government. The Court said that forfeiture is not part of the punishment for the criminal offense and that the provision of the Fifth Amendment relating to double jeopardy does not apply.

Helvering v. Mitchell, 303 U. S. 391 (1938), was a civil suit to collect an income tax deficiency and a 50% penalty for fraudulent tax evasion. The defendant had been *acquitted* in a prior criminal proceeding involving the same tax deficiency. The Court held that the acquittal did not bar the Government from collecting the 50% penalty in a *civil* suit since (1) the difference in burden of proof in criminal and civil cases precludes application of *res judicata*, and (2) the double jeopardy clause of the Fifth Amendment may be invoked only in a *criminal* proceeding.

The case at bar is a civil suit to seize and condemn an allegedly misbranded drug. The primary purpose of this suit is to protect the public, not to

punish the shipper of the drug. In fact, the food and drug law contemplates that if a condemned article is susceptible of being brought into compliance with the law, the owner may repossess it on condition that he bring it into compliance with law. This emphasizes the objective of a seizure action to shield the public rather than to penalize the shipper.

VI

ARGUMENT

A. *Introduction*

For some years, Appellee Walter W. Gramer, has been responsible for the interstate distribution of the proprietary drug "Sulgly-Minol" which he represents as efficacious in the treatment, cure, and prevention of rheumatism, arthritis, boils, and acne.

To obtain the remarkable benefits which Sulgly-Minol allegedly affords to those who suffer from these afflictions, it is only necessary to "rub it on the soles of both feet, before going to bed"; relief follows regardless of the situs of the ailment. (R. 28).

It is the consensus of medical opinion available to the Government that Sulgly-Minol is an irrational and worthless treatment for any of these con-

ditions. [1] For this reason, a number of criminal and civil enforcement actions under the Federal Food, Drug, and Cosmetic Act have been directed against Mr. Gramer and his product. In each case, the charge was that the drug was misbranded because of the false and misleading therapeutic claims in its labeling regarding its efficacy in the treatment, prevention, and cure of arthritis, rheumatism, boils, and acne. The criminal cases were instituted under authority of Section 303(a) of the Act. [21 U.S.C. 333 (a)]. The civil or seizure cases were instituted under authority of Section 304(a) of the Act. [21 U.S.C. 334(a)].

The first criminal prosecution, *United States v. Walter W. Gramer* (D. Minn.) was terminated on November 3, 1947, by Mr. Gramer's plea of guilty,

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[1] While this statement of fact is not in the Record through medical testimony, it is the essence of the misbranding charge in the Libels. (R. 4). The Lower Court's Judgment granting the claimant's Motion for Summary Judgment is predicated upon the assumption that the acquittal in a prior criminal case is a complete legal defense even if Sulgly-Minol is irrational and worthless in the treament of these conditions. On the claimant's motion for summary judgment, the Court must accept the allegations of the Libel as true. See *McCombs v. West*, 155 F. (2d) 601, 602 (C.A. 5, 1946); *Furton v. City of Menasha*, 149 F. (2d) 945, 946 (C.A. 7, 1945), cert. den. 326 U.S. 771.

the Court deferring imposition of sentence and placing Mr. Gramer on probation for 30 days. (DDNJ 2281).[2]

Three subsequent seizure actions have resulted in default decrees of condemnation and destruction. *U. S. v. 100 Bottles . . . Sulgly-Minol* (W.D. Wisc., August 9, 1948), DDNJ 2481; *U. S. v. 79 Bottles . . . Sulgly-Minol* (N.D. Texas, June 29, 1950), DDNJ 3154; and *U. S. v. 23 Bottles . . . Sulgly-Minol* (S.D. Calif., June 16, 1950), DDNJ 3155.

A second criminal Information was filed against Walter W. Gramer in the District of Minnesota on November 30, 1948. (R. 23-5). After a trial before the Court, Mr. Gramer was, on April 6, 1949, adjudged not guilty as charged and the Information was dismissed. (R. 26).

Thereafter, the instant seizure actions involving theretofore unlitigated shipments of Sulgly-Minol were brought in the Western District of Washington. In dismissing these actions, the Lower Court assumed

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[2] DDNJ is an abbreviation for Drugs and Devices Notices of Judgment issued by the Federal Security administrator pursuant to 21 U.S.C. 375(a). The Courts take judicial notice of such Notices of Judgment. See *Colgrove v. U. S.*, 176 F. (2d) 614, 615, footnote 1 (C.A. 9, 1949), cert. denied 70 S. Ct. 349 (January 9, 1950); *Libby, McNeill & Libby v. U. S.*, 148 F. (2d) 71, 73, footnote 3 (C.A. 2, 1945).

that the acquittal of Mr. Gramer in the second criminal prosecution was a complete legal defense.

It is our position that (1) the burden of proof in a criminal case under the Federal Food, Drug, and Cosmetic Act is "beyond a reasonable doubt"; (2) the instant consolidated seizure case is a civil proceeding where the burden of proof upon the Government is "by a preponderance of the evidence"; (3) an acquittal in a criminal prosecution under 21 U.S.C. 333(a) is not a bar to a subsequent seizure action under 21 U.S.C. 334(a) involving other shipments of the same article and the same charges of misbranding; and (4) an acquittal in a criminal prosecution under 21 U.S.C. 333(a) is immaterial in a subsequent seizure action under 21 U.S.C. 334(a) involving other shipments of the same article and the same charges of misbranding, and such acquittal is not a valid affirmative defense.

We raise no question in this case as to whether the prior adjudications *against* Walter W. Gramer and *against* Sulgly-Minol could have any effect as *res judicata* in the present proceeding.

We contend that the acquittal upon which the Lower Court relied in granting the claimant's Motion for Summary Judgment merely indicates that in the particular *criminal* case the Court did not feel

that the Government had sustained its burden of proving *every material fact* charged in the Information *beyond a reasonable doubt.*

B. *In Criminal Actions Under the Federal Food, Drug and Cosmetic Act, the Government Must Prove Its Case "Beyond a Reasonable Doubt"*

In criminal prosecutions under this Act (21 U.S.C. 333), the Government has the usual burden of proving every allegation of material fact "beyond a reasonable doubt." This proposition is settled, and is apparently not challenged by the Appellee in this case.

Pasadena Research Laboratories, Inc. v. U. S., 169 F. (2d) 375, 379 (C.A. 9, 1948), cert. den. 335 U.S. 853;

U. S. v. Crescent-Kelvan Co., 164 F. (2d) 582, 588-9 (C.A. 3, 1948).

C. *A Seizure Action under the Federal Food, Drug, and Cosmetic Act Is a Civil Suit where the Government's Burden of Proof is "by a Preponderance of the Evidence."*

Seizure actions under Section 304(a) of the Act [21 U.S.C. 334(a)] are *in rem* proceedings, and it is settled that they are civil in nature.

Alberty Food Products Co. v. U. S., — F. (2d) —— (C.A. 9, Nov. 20, 1950, No. 12,483).

443 Cans of Frozen Egg Product v. U. S., 226 U.S. 172, 183-4 (1912);

U. S. v. 935 Cases of Tomato Puree, 136 F. (2d) 523, 525-526 (C.A. 6, 1943), cert. den. 320 U. S. 778;

U. S. v. 62 Packages . . . Marmola, Prescription Tablets, 48 F. Supp. 878, 884 (W.D. Wisc., 1943), Affirmed 142 F. (2d) 107, 109 (C.A. 7, 1944), cert. den. 323 U.S. 731.

Appellee recognizes that the instant proceedings are civil since his Motion for Summary Judgment expressly relies upon Rule 56 of the Federal Rules of Civil Procedure (R. 35-6), as does the Lower Court's Order Granting Summary Judgment and Dismissal. (R. 38-9).

In seizure proceedings under the Federal Food, Drug, and Cosmetic Act of 1938, the burden of proof upon the Government is the usual one in civil cases — e.g., to prove its allegations only "by a preponderance of the evidence," and not "beyond a reasonable doubt."

U. S. v. 5 Cases . . . Figlia Mia . . . Olive Oil, 179 F. (2d) 519, 524 (C.A. 2, 1950), cert. den. 339 U.S. 963;

U. S. v. 11¼ Dozen Packages . . . Mrs. Moffat's Shoo Fly Powders for Drunkenness, 40 F. Supp. 208, 209 (W.D. N.Y., 1941);

C. C. Co. v. U. S., 147 F. (2d) 820, 824-5 (C.A. 5, 1944).

Some Courts, and they were distinctly in the minority, attempted to create a hybrid burden of

proof for the Government in seizure actions that arose under the predecessor Federal Food and Drugs Act of 1906 — namely, something more than a "preponderance of the evidence" yet something less than "beyond a reasonable doubt." They emerged with the rule that the Government's evidence must be "clear and convincing" or "clear and satisfactory."

> *Van Camp Sea Food Co., Inc. v. U. S.*, 82 F. (2d) 365, 366 (C.A. 3, 1936).

The requisite degree of proof in seizure cases has been frequently considered by the District Courts in the 44 years of enforcement, first of the Federal Food and Drugs Act of 1906 and later of the Federal Food, Drug and Cosmetic Act of 1938. In the usual situation, the Courts' views were embodied in charges to the jury that have not been reported in the Federal Reporter System. Such unreported cases do appear in the volume "Decisions of Courts in Cases Under the Federal Food and Drugs Act" by White and Gates (1934). On pages 1367 and 1368 of the Index under the heading "Burden of Proof", 27 such cases are listed. In the volume "Federal Food, Drug, and Cosmetic Act 1938-1949" by Kleinfeld and Dunn (1949), 6 additional cases are listed in the Index, page 873, under the heading "Burden of Proof."

We submit that there is neither statutory basis

nor compulsion in reason for increasing the burden of proof in seizure actions beyond what normally prevails in civil cases. On the contrary, as recognized in *C. C. Co. v. U. S.*, 147 F. (2d) 820, 824-5 (C.A. 5, 1944), where the Court reversed itself on the Government's petition for rehearing, it is inconsistent with the remedial purposes of this law and the liberal attitude of the Courts in construing it to exact a higher degree of proof than a mere preponderance of the evidence. See also *Research Laboratories, Inc. v. U. S.* 167 F. (2d) 410, 421 (C.A. 9, 1948), cert. den. 335 U. S. 843; *Pasadena Research Laboratories, Inc. v. U. S.*, 169 F. (2d) 375, 379 (C.A. 9, 1948), cert. den. 335 U.S. 853.

In summing up this part of our argument, we submit that seizure actions are civil suits. We further submit that the burden of proof in a *criminal* case under Section 303 of the Act (21 U.S.C. 333) is greater than the burden of proof in a *seizure* action under Section 304 of the Act (21 U.S.C. 334).

D. *An Acquittal in a Criminal Case under the Federal Food, Drug, and Cosmetic Act Does Not Stand as a Bar to a Subsequent Seizure Case under that Act Based Upon the Same Misbranding Charge.*

In denying the Government's Motion to Strike and in granting the Claimant's Motion for Summary

Judgment, the District Court relied upon the case of *Coffey v. United States*, 116 U.S. 436 (1886). It is our position the Court erred in failing to take cognizance that the instant case is distinguishable from the *Coffey* case on the ground that the primary objective here is civil and remedial — not to impose punishment for past acts but to arrest misbranded drugs before they mislead or otherwise do harm to the consuming public. Furthermore, the transactions involved in this case in the Western District of Washington do not grow out of and are not the same transactions with respect to which Gramer was charged and acquitted in the District of Minnesota. It follows that no question of double jeopardy can be involved.

Coffey v. United States, supra, was an *in rem* proceeding against 10 barrels of apple brandy, 1 apple mill, 37 tubs, and 2 copper stills. It was charged by the Government that these articles were subject to forfeiture because they were utilized by Coffey in fraud of certain provisions of the internal revenue laws. Coffey's defense was that he had previously been prosecuted criminally on the same charges, *and acquitted*. In sustaining this defense, the Supreme Court stated (pages 442-443):

> "It is true that §3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on

the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem and a civil action,* while that to enforce the fine and imprisonment must be a criminal proceeding . . . Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by, the United States where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.* It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem.* Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The language in the *Coffey* opinion which Justice Frankfurter has termed "uncritical" [see his con-

curring opinion in *U. S. ex rel Marcus v. Hess* 317 U.S. 537, 554 (1943)], has been fruitful of litigation and has been challenged, narrowed, and distinguished in many cases.

At an early date, the Supreme Court began to delimit the scope of the *Coffey* case. Thus in *Stone v. United States*, 167 U.S. 178 (1897), affirming a decision of this Court (64 Fed. 667), the Supreme Court stated at pages 186-187:

> "We are of opinion that the present case is not covered by the decision in *Coffey v. United States*. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be 'again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts.' In the *Coffey case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the court referred to *United States v. McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground 'that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*'." (Italics supplied by Court).

The *Stone* case therefore (1) enunciates the proposition that a person may not be twice punished for the same offense, and (2) declares the holding in the *Coffey* case to have been predicated upon "double jeopardy" rather than "res judicata." As will

be shown later in this brief, the distinction between "double jeopardy" and "res judicata" is significant here. Under what circumstances, however, can it be said that a civil suit against a defendant (who has been previously convicted or acquitted in a criminal prosecution) is an attempt to inflict a second punishment? Cases coming after the *Stone* case have wrestled with this problem and produced new refinements.

On February 24, 1931, the Supreme Court handed down two opinions which are pertinent here though neither or them cites the *Coffey* case. Both were civil actions brought by the Government against persons who had previously been *convicted* in criminal prosecutions charging them with violating the National Prohibition Act. In *United States v. La Franca,* 282 U. S. 568[3], the Government sought to collect taxes and penalties arising out of the same sales of intoxicating beverages that had been the basis of the defendant's conviction. After holding that the sums sought by the Government were penalties, the Court stated on page 573:

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[3] The language in this case as well as in *Coffey* case is termed "uncritical" by Justice Frankfurter in his concurring opinion in *U. S. ex rel Marcus v. Hess,* 317 U.S. 537, 554 (1943).

> "Respondent already had been convicted and punished in a criminal prosecution for the *identical transactions* set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?" (Italics added).

The Court gave its answer to this question on page 575:

> "But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action . . ."

In this case, therefore, the Court held that the prior conviction was a bar to the civil suit to recover a monetary penalty arising out of the identical transactions.

But in the companion case of *Various Items of Personal Property et al v. United States*, 282 U.S. 577, the Court held that a prior conviction for defrauding the Government of taxes on distilled spirits did *not* bar a civil action to *forfeit* the distillery and other property which the defendants had used in so defrauding the Government. On page 580, the Court stated:

> "In *United States v. La Franca, ante*, p. 568, we hold that, under §5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred

by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding in rem to forfeit property used in committing an offense . . ." . . . The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . ." *The Palmyra* 12 Wheat. 1, 14 . . . (And) in *Dobbin's Distillery v. United States*, 96 U.S. 395 . . . the Court . . . said (p. 401):

" 'Nothing can be plainer in legal decision than the proposition that the offense therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.'

"To the same effect, see . . . *United States v. Five Boxes of Asafoetida*, 181 Fed. 561, 564 . . .

"A forfeiture proceeding under R. S. 3257 or 3281 is *in rem.* It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. *In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the the punishment for the criminal offense . . . The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply* . . ." (Italics supplied).

Let us now briefly consider the status of the *Coffey* case as of February 24, 1931 — the date of

the decisions in the *La Franca* case and the *Various Items of Personal Property Case.* As pointed out in the *Stone* case, the *Coffey* case rested upon the proposition that a person may not be punished twice for the same offense — which means he could not be put in jeopardy twice for the same offense. Under the *Coffey* case, therefore, a civil forfeiture proceeding based upon violation of the internal revenue laws was barred by the fact that the claimant had been *acquitted* in a prior criminal prosecution based upon the same offense, and that the forfeiture sought would be another punishment for the same offense. From this proposition and the reference in the Coffey opinion to *U. S. v. McKee* (at 116 U.S. 445), the inference is inescapable that a *conviction* in a prior criminal case would certainly bar a later forfeiture proceeding.

But on February 24, 1931, the Supreme Court split that inference. It held that a conviction in a prior criminal case would bar a later civil action to recover a *monetary* penalty. *(La Franca* case). But it also held that a conviction in a prior criminal case would not bar a later *in rem forfeiture* proceeding since "the forfeiture is no part of the punishment for the criminal offense" and since "the provision of the Fifth Amendment to the Constitution in re-

spect of double jeopardy does not apply." *(Various Items of Personal Property* case*)*.

The *Various Items of Personal Property* case is wholly inconsistent with the *Coffey* case. Upon facts on all fours with the *Coffey* case except that there had been a *conviction* in the prior criminal case, the Court held that the defense of double jeopardy could not properly be invoked and that the forfeiture was not a penalty for the criminal offense. We submit that on February 24, 1931, the Supreme Court came as close to overruling the *Coffey* case as it is possible to do *sub silentio.*

There remained the *La Franca* case as a vestigial residue of the *Coffey* case. The *La Franca* case, however, in its turn received the "distinguishing" treatment in *Helvering v. Mitchell,* 303 U.S. 391 (1938). This case is best considered in the light of the Court of Appeals decision it reversed, *Mitchell v. Commissioner of Internal Revenue,* 89 F. (2d) 873 (C.A. 2, 1937). There the Government sought judgment both for an income tax deficiency of $728,709.84 and for a 50% penalty for fraudulent tax evasion amounting to $364,354.92. The defendant had been acquitted in a prior criminal proceeding involving the same tax deficiency. Judge Augustus N. Hand, writing the opinion of the Court of Appeals, affirmed the judg-

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ment for the tax deficiency but not for the 50% penalty. His reasons, stated at 87 F. (2d) 878, were in part:

> "The . . . rule necessarily derivable from *Coffey v. United States* would seem to be that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures of property which are in their nature criminal penalties. Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey v. Unted States* which is binding on us in the absence of a modification by the Supreme Court."

Judge Hand also cited the *La Franca* case on page 878. One cannot but feel sympathetic with the Judge trying to steer between the judicially created Scylla and Charybdis.

Reversing the Court of Appeals insofar as it had not affirmed the judgment for the 50% penalty, the Supreme Court made the following rulings in charting the course:

> *Page 397*
>
> "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' . . . That acquittal on a criminal charge is not a bar

to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."

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"Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether §293(b) imposes a criminal sanction. That question is one of statutory construction."

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"Forfeiture of goods (etc.) . . . are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789."

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"That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guarantees governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guarantees do not apply."

In the significant final paragraph of its opinion, the Supreme Court stated (pages 405-406):

"Mitchell insists that *Coffey v. United States*, 116 U.S. 436, requires affirmance of the judgment; the Government argues that this case is

> distinguishable, and if not, that it should be disapproved. The *Circuit Court of Appeals, citing Stone v. United States*, 167 U.S. 178, 186-189, *and later cases, recognized that the rule of the Coffey case 'did not apply to a situation where there had been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof'*; but construing §293(b) as imposing a penalty designed to punish fraudulent tax dodgers 'and not a mere preventive measure,' it thought that the *Coffey* case and *United States v. La Franca*, 282 U.S. 568, required it 'to treat the imposition of the penalty of 50 per cent as barred by the prior acquittal of Mitchell in the criminal action.' Since we construe §293(b) as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of the $364,354.92, the 50 per centum addition here in issue."
> (Italics added).

Thus the Supreme Court in 1938 decided in the *Mitchell* case that the imposition of the 50% penalty was a *civil remedy* not barred by an acquittal in a prior criminal prosecution presenting the same factual issues. [To the same effect, see *U. S. v. National Association of Real Estate Boards*, 70 S. Ct. 711, 716 (1950).] Obviously, the Court did not accept the acquittal in the criminal case as *res judicata*. If the acquittal is a bar, it is only "because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy v.*

United States, 272 U.S. 630, 632." (303 U.S. at page 398). But the constitutional guaranty against double jeopardy does not apply to a civil case (303 U.S. at page 402).

The *Murphy* case (272 U.S. 630) referred to in *Helvering v. Mitchell*, was a suit in equity to abate an alleged nuisance maintained in violation of the Prohibition Act. The defendants had been previously tried and acquitted in a criminal case that charged them with maintaining the same nuisance. It was the holding of the Supreme Court that the prior acquittal was not a bar to the decree of injunction entered by the lower court (page 632):

> "If we are right as to the purpose of §22 the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar. *For although the parties to the two cases are the same, the judgment in the criminal case does not make the issues in the present one res judicata*, as is sufficiently explained in *Stone v. United States*, 167 U.S. 178 and *Chantangco v. Abaroa*, 218 U.S. 476. *The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place.* Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a carefully considered case, *State v. Roach*, 83 Kan. 606." (Italics added).

From the *Murphy* case, it is clear that an acquittal in a criminal case can never be *res judicata* in a subsequent civil case, though such an acquittal may be invoked under the defense of *double jeopardy* to bar a later proceeding attempting to inflict a *punishment* for the same offense.

From the *Various Items of Personal Property* case, it is clear that the plea of *prior jeopardy* is not valid in an *in rem* forfeiture proceeding since such a proceeding does not inflict a punishment for a criminal offense.

From the case of *Helvering v. Mitchell*, it is difficult to see how any *in personam* civil suit to collect a monetary penalty could be barred by a judgment in a prior criminal case, either on the ground of *res judicata* or on the ground of *double jeopardy*.

We submit that the *Coffey* case has been distinguished to death though we call the Court's attention to the fact that it has not yet been properly laid to rest. In *United States v. National Association of Real Estate Boards*, 70 S. Ct. 711 (May 8, 1950), the Supreme Court reiterated the ruling of *Helvering v. Mitchell* that a judgment of acquittal in a criminal action is not *res judicata* in a later civil action. How-

ever, on page 716, footnote 6, the Court postponed interment of the *Coffey* case:

> "Since the Court (in Helvering v. Mitchell) ruled that the 50 per cent penalty was not a criminal penalty but a civil administrative sanction . . . the case was considered distinct from *Coffey v. United States* . . ., which held that the facts ascertained in a criminal case as between the United States and the claimant could not be again litigated between them in a civil suit which was punitive in character."

In view of the cases cited in this brief, we respectfully submit it will be difficult to conjure up a civil suit "punitive in character."

We think the case of *State v. Roach*, 83 Kan. 606, 112 Pac. 150 (1910) may be of interest to this Court in view of the words of praise written by Justice Holmes in *Murphy v. United States*, supra, 272 U.S. at page 633. In a clear yet respectful manner, the *Roach* case offers the most devastating criticism of the *Coffey* case that we have discovered in our research. Refusing to wink at the obvious flaw in the reasoning of the *Coffey* case, the Kansas Supreme Court stated (83 Kan. 609; 112 Pac. 151):

> "*The decision in the Coffey case seems to have been based rather upon the rule against a second jeopardy than upon the doctrine of res judicata,* the court apparently treating a civil action to recover a penalty for a violation of the law as in effect a criminal prosecution, although

> the state courts have generally taken the other view . . ." (Italics added).

And at page 611 (112 Pac. 152), the Court uttered its keenest argument:

> "*The higher standard of proof* required of the plaintiff in a criminal action is so frequently mentioned in discussions of the doctrine of *res judicata* that its bearing on the subject may be said to be generally recognized. True, its mention is often associated with other matters that would alone be controlling. *But this difference between civil and criminal litigation is either without any significance at all in this connection or it is decisive*, and of itself prevents either party to an action from being concluded therein by a previous judgment obtained in a proceeding where the rule of evidence was less favorable to him. We think, upon principle and authority, an acquittal in a criminal case does not for all purposes amount to an adjudication against the state that the defendant did not commit the acts charged against him. *What a verdict of not guilty really decides is that the evidence does not exclude every reasonable doubt of the defendant's guilt.* If in the present case the injunction action had been tried first it would hardly be seriously contended that a judgment for the plaintiff would bar a defense in the criminal action. A sufficient reason why the defendant would not be concluded by the result in the civil case is that his guilt would not have been established beyond a reasonable doubt. *The consideration that protects him against the plea of res judicata in the one case deprives him of its benefits in the other.*" (Italics added.)

Again we would remind this Court that Justice

Holmes, writing the opinion of a unanimous Court in *Murphy v. United States, supra*, said:

> "Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a *carefully considered case, State v. Roach*, 83 Kan. 606." (Italics added).

We are, of course, not asking this Court to overrule the *Coffey* case. The foregoing argument was intended to summarize some of the highlights of the unhappy history of that case. In the remainder of our argument we will show how clearly the instant case falls outside the ambit of the *Coffey* case in the light of the intervening decisions.

At the outset, we wish to advise the Court that there have been two decisions adverse to the Government's position under the Federal Food and Drugs Act of 1906, though the instant case is the first of its kind under the Federal Food, Drug, and Cosmetic Act of 1938. *Stanley v. U. S.* 111 F. (2d) 898 (C.A. 6, 1940) was a case where the dismissal of an indictment *upon a demurrer* was held to be *res judicata* in a subsequent seizure action involving the same allegedly misbranded product. The opinion is extremely short, citing the *Coffey* case and several others. The second opinion, that of *U. S. v. 119 Packages . . . Z-G-Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936) is also short; it does not even cite the *Coffey* case. It might

be of interest that both the *Stanley* case and the *Z-G-Herbs* case involved the same product and were based upon the dismissal of the same criminal case. (N.J. 31107). We submit that these opinions are erroneous and do not explore the important question involved as fully as it merits.

Earlier in our argument, we showed that the instant case is a civil *in rem* proceeding under the Federal Food, Drug, and Cosmetic Act in which the Government's burden of proof is less than in criminal cases under the same Act. Actually, the statute provides three separate types of enforcement action—criminal, seizure, and injunction. (21 U.S.C. 333, 334 and 332). While the over-all purpose of the Act is to protect the consumer, the major emphasis in the criminal sanction is to punish for past violations. Thus, in House Report No. 2139, 75th Cong., 3d Sess., page 4 (April 14, 1938), the Committee on Interstate and Foreign Commerce stated with respect to this provision in the then pending bill:

> "Section 303 increases substantially the criminal penalties of the present law which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business."

On the other hand, in the seizure and injunction remedies, the main emphasis is upon direct and

immediate protection of the public by apprehension of the violative article itself before it can do damage, and by enjoining further distribution of such article. Also in House Report No. 2139, *supra*, it is stated on page 4:

> "Since the seizure procedure is peculiarly adapted to the enforcement of a consumer-protective law in that it arrests the illegal goods before the consumer is harmed, your committee has been careful to avoid restricting this form of of action in cases where there is actual need for its exercise to protect health or prevent fraud."

It will further be observed that Section 304 (21 U.S.C. 334) fully and completely defines the conditions under which articles are liable to seizure and forfeiture. There is no reference to or dependence upon the criminal sanction provided for in Section 303 (21 U.S.C. 333). It is unimportant so far as the seizure proceeding is concerned whether or not any person is convicted under Section 303. Congress has defined fully in Section 304 when and under what circumstances the article shall be subject to seizure and forfeiture, without reference to the penalty that may be inflicted upon the shipper or anyone else under Section 303. On the other hand, it is provided in Section 305 (21 U.S.C. 335) that before any violation is reported to any United States Attorney for the institution of *criminal proceedings*,

the person against whom such proceeding is contemplated shall be given an opportunity to be heard. No such opportunity for a hearing is to be given prior to the *seizure* of the contraband article. The very purpose of Section 304 demands that a seizure of the article be made instantly upon the discovery of its contraband nature and before the article can be distributed in the channels of retail trade. Thus, it becomes clear that the purpose of a seizure action under Section 304 of the Act is protection of the consumer from an adulterated or misbranded product and not the infliction of a penalty or punishment against the shipper or owner.

If additional confirmation of this view is needed, it may be found within the statutory language. Section 304(a) authorizes seizure and condemnation of an adulterated or misbranded article. However, Section 304(d) [21 U.S.C. 334(d)] permits the owner of the condemned article to take such article down under bond in the discretion of the Court for the purpose of salvaging it by bringing it into compliance with law; the condition of the bond being that the article will not be disposed of contrary to law. Such a practice is very common in U. S. District Courts as can be readily seen by a random review of the Notices of Judgment. Of course, where an article is of such a nature that it cannot be brought into

compliance with law through relabeling or reprocessing, the owner will be denied the privilege of salvage. *Research Laboratories, Inc. v. United States*, 167 F. (2d) 410, 423 (C.A. 9, 1948), cert. denied 335 U. S. 843.

In a closely analagous situation, the Supreme Court has held that a statutory provision relieving an individual from the harshness of a detriment imposed by statute was a clear indication that such statute was not intended as a punishment. *Murphy v. United States, supra*, 272 U. S. 630 (1926). There the statute authorized the District Court to issue an injunction restraining defendants from occupying or using their premises *for one year* if it was found that intoxicating liquor had been unlawfully manufactured, sold, or stored there. However, the statute made it discretionary with the Court to permit occupany of the premises upon the posting of a bond conditioned that intoxicating liquor would not be sold, kept, etc., on the premises. The defendants had been acquitted in a criminal case involving the same nuisance and they argued they could not be punished in a second proceeding. On pages 631-632, the Court rejected their contention and held that the equity proceeding did not inflict a punishment:

> "It is true, especially if the premises are closed for a year, that a pecuniary detriment is

> inflicted, but that is true of a tax, and sometimes it is hard to say how a given detriment imposed by law shall be regarded . . . The mere fact that it is imposed in consequence of a crime is not conclusive . . . *(A government) may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime.* The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. This seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result. The imperative words go only to the immediate stopping of what is clearly a nuisance. *The permissive words allow closing for a year (a not unreasonable time to secure a stoppage of the unlawful use . . .) and show the purpose of that by providing the alternative of a bond conditioned against such uses.*"
> (Italics added).

On the basis of this case alone we submit that it would be unreasonable to hold that the seizure provisions of the Act here involved are punitive,[4] since they specifically authorize return of the goods under seizure to the owner on condition that he bring them into

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[4] See also *U. S. ex rel Marcus v. Hess*, 317 U.S. 537 (1943) where the Court said on page 551:

> "It is true that 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute . . ."

compliance with the law. In other words, in order to reacquire full possession of this property, the owner is required to do only what he should have done in the first place; this can hardly be deemed a punishment.

Earlier in this brief, we cited *Various Items of Personal Property v. U. S.*, 282 U.S. 577 (1931) where the Supreme Court held that an *in rem* forfeiture proceeding is independent of the personal responsibility of the owner. Among the cases cited by the Court (on page 581) as being "to the same effect" is *U. S. v. Five Boxes of Asafoetida*, 181 Fed. 561, 564, (E.D. Pa., 1910) a case that arose under the Federal Food and Drugs Act of 1906. In the *Asafoetida* case, the District Court had said at the page cited:

> "The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in section 10."

The Supreme Court might also have cited its own opinion regarding the independence of the seizure and criminal provisions of the Federal Food and Drugs Act of 1906—e.g., *Hipolite Egg Co. v. U. S.*, 220 U.S. 45 (1911). There the Court had said on page 55:

> "It is certainly to the interest of a producer or consumer that the article which he receives

> . . . shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. *There is nothing inconsistent in the remedies, nor are they dependent.*"
> (Italics added).

Perhaps one final argument will suffice to show the absurd result which must follow if the *Coffey* case is deemed to govern here. As we have demonstrated, the *Coffey* case was based upon the theory of "double jeopardy", not upon the theory of "res judicata". While the opinion in the *Coffey* case may be somewhat ambiguous on this point, subsequent decisions of the Supreme Court have eliminated all uncertainty. It is now clear that the Court's efforts are intended to avoid subjecting a person to double punishment for the same offense. If the *Coffey* case bars a seizure action after *acquittal* in a prior criminal case, then it must *a fortiori* bar a seizure action after a *conviction* in a prior criminal case. Consequently, if a defendant is once *convicted* of violating the Federal Food, Drug, and Cosmetic Act, the Government would be barred from thereafter seizing the misbranded or adulterated article which was involved in the criminal case, since such seizure would then constitute a second punishment.

In the *Coffey* case and in all the decisions of the courts heretofore discussed in this brief in which

the rule in the *Coffey* case is brought into play, with the possible exception of *Stanley v. United States*, 111 F. (2d) 898, the same transaction was involved in the criminal case and in the related civil case—e.g., the prosecution, verdict, and judgment were based upon the identical facts that were involved in the subsequent suit for penalty or forfeiture. The question presented in each was whether the civil proceeding to enforce the penalty or forfeiture was barred by the prior conviction or acquitted in a criminal case based on the *very transaction* relied upon in the civil proceeding. The shipment of Sulgly-Minol which was the basis of the criminal case in the District of Minnesota where Gramer was acquitted was made *on April 16, 1948.* The shipments involved in the instant seizure actions were made *on October 15, October 17, and November 22, 1949.* (R. 4, 7, 11, 14). It is the introduction into interstate commerce of the misbranded article which constitutes the offense under 21 U.S.C. 331. Since each shipment thus constitutes a separate offense and since the shipment involved in the Minnesota case was separate and distinct from the shipments involved here, we submit it is not possible to conceive that this consolidated seizure case in any way constitutes an attempt to inflict a second punishment upon the appellee for the

same offense that was involved in the criminal case in the District of Minnesota.

Moreover, if seizure actions are penalties within the "jeopardy" provision of the Fifth Amendment, then multiple seizures such as are authorized by Section 304(a) of the Act [21 U.S.C. 334(a)] would be invalid. Yet in *Ewing v. Mytinger & Casselberry, Inc.*, 70 S. Ct. 870 (1950), the Supreme Court recently sustained the constitutionality of the multiple seizure provision of the statute under the Fifth Amendment. The Court's opinion deals with the "due process" clause and does not even mention the "jeopardy" clause.

In summation, we submit that the *Coffey* case is an interesting judicial phenomenon without relevance here. An acquittal in a criminal case is not *res judicata* in a subsequent *in rem* seizure action under the Federal Food, Drug, and Cosmetic Act because of the difference in burden of proof. A seizure action is not a punishment for a criminal offense and therefore may not be barred under a *double jeopardy* plea based upon an acquittal in an earlier criminal case.

VII

CONCLUSION

We submit that the District Court erred in failing to grant the Government's Motion to Strike, and erred in granting the Claimant's Motion for Summary Judgment. We respectfully ask this Court to reverse the decisions of the Lower Court accordingly.

Respectfully submitted,

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United States Court of Appeals

For the Ninth Circuit

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—vs.—

WALTER W. GRAMER, *Appellee.*
Claimant of 213 Bottles, etc.

No. 12741

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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I. *Coffey v. United States*, 116 U.S. 436 (1886), which has been followed without deviation to this day, decided in appellee's favor the issue posed by this appeal.

The issue of this appeal may be generally stated as follows: *Is acquittal of a defendant in a criminal action a bar to a subsequent civil in rem forfeiture action brought against the goods of the defendant where the charge in the civil libel is based on the same issue as the charge in the criminal information?*

The Supreme Court in *Coffey v. United States*, 116 U.S. 436 (1886) authoritatively and finally answered this exact question. Moreover, the legal contention urged on the Court and rejected by it in that case is the selfsame contention which the Government raises here, *i. e.*, that the higher degree of proof required of

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the Government in the former proceeding prevents judgment in the criminal action from barring the later *in rem* action.

The following excerpt from an article by W. G. McLaren of the Seattle Bar, entitled "The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," summarizes the facts and holding of the *Coffey* case:

> "In *Coffey v. U.S.*, decided in 1886, Coffey was defending a forfeiture proceeding brought by the United States against certain property said to belong to Coffey, the forfeiture being in the nature of penalty for an alleged violation of the Internal Revenue laws. Coffey set up as a special defense that the acts charged in the forfeiture information were the same as were contained in a certain criminal information theretofore filed against him, upon which information, after a trial before a jury, he had been found not guilty. The court said there was no question but that—
>
> " '* * * the fraudulant acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit.'
>
> " 'The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of the opinion that it is.'
>
> "After pointing out that one of the proceedings was civil and the other criminal, the court said:
>
> " 'Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United

States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*'

"The court first denied the contention that the differences in the degree of proof required in the two proceedings — that is 'beyond reasonable doubt' and 'preponderance of proof' could affect the question of *res judicata.* The court said:

" 'The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, *did not exist.* This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of *any* statutory punishment denounced as a consequence of the existence of the facts' (Italics ours)." (1935) 10 Wash. L. Rev. 198

It will be noticed that the Court limited its holding to the situation where the subsequent civil action is an *in rem* action for forfeiture.

The rule laid down in the *Coffey* case has been applied to each and every federal case since 1886 in which the elements present in the *Coffey* case have coincided. These elements are: (1) that the prior criminal action resulted in acquittal, (2) that the subsequent action was a civil libel *in rem* for for-

feiture, and (3) that claimant of the goods in the *in rem* action was the same person who was acquitted in the criminal action.

These three elements have been present, and the *Coffey* rule applied, in the following eleven cases:

1. *United States v. A Lot of Precious Stones and Jewelry*, 134 Fed. 61 (C.A. 6, 1905). Here a man and wife were proceeded against criminally for fraudulently importing jewelry into the United States in violation of the revenue laws. The man was acquitted, and the court, at the request of the Government, entered a *nolle prosequi* in the action against the wife. In a subsequent *in rem* action brought by the Government to forfeit the property which was alleged to have been fraudulently imported, the trial judge sustained a demurrer as to both the husband and wife, who appeared as claimants. On appeal, applying the *Coffey* principle, the Sixth Circuit affirmed the dismissal as to the husband, but reversed as to the wife, since the wife had not been acquitted in the criminal action. In the course of its opinion, the court said, at page 63:

> "It is clear that under the rule laid down in *Coffey v. U.S.*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684, approved in *Boyd v. U.S.*, 116 U.S. 616, 634, 6 S. Ct. 524, 29 L. Ed. 746; *U.S. v. Zucker*, 161 U.S. 475, 478, 16 S. Ct. 641, 40 L. Ed. 777; and *Stone v. U.S.*, 167 U.S. 178, 184, 17 S. Ct. 778, 42 L. Ed. 127, the acquittal of Schmidt operated as a bar to the further prosecution of the suit *in rem* so far as it concerned him."

2. *United States v. Seattle Brewing & Malting Co.*, 135 Fed. 597 (N.D. Wash., 1905). The defendant had

been acquitted in a criminal prosecution for causing to be placed in interstate commerce certain casks containing bottled beer, misbranded as containing soda water. Later the Government brought a civil action for forfeiture of the product. District Judge Hanford overruled the Government's demurrer to defendant's plea of *res judicata*, saying:

> "The question whether the Government, after having been defeated in the prosecution of a criminal case against the defendant for the doing of a prohibited act, may by waging a civil action against him, enforce the provisions of a penal statute by condemnation of property as forfeited and compelling the defendant to pay a fine, was learnedly discussed and finally determined by the Supreme Court of the United States in the case of *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684. In later decisions by the Supreme Court the *Coffey* case has been referred to but without modifying or departing from the rule which it established. See *Stone v. United States*, 167 U.S. 178, 196, 17 S. Ct. 778, 42 L. Ed. 127. The affirmative allegations of the answer bring this case fairly and fully within the rule of the *Coffey* case, and this court cannot hesitate in its duty to overrule the demurrer interposed in behalf of the Government."

3. *United States v. Rosenthal*, 174 Fed. 652 (C.A. 5, 1909). In this case the defendants had been acquitted of the crime of smuggling. Thereafter a libel was brought by the Government against the property which was the subject of the alleged smuggling. The libel was dismissed by the trial judge, and on appeal the Circuit Court affirmed, holding in a *per curiam*

opinion that the lower court had properly applied the *Coffey* case.

4. *Sierra v. United States*, 233 Fed. 37 (C.A. 1, 1916). Here the First Circuit followed the Fifth Circuit in holding that acquittal of a criminal charge of smuggling was a complete bar to an *in rem* action for forfeiture. The *Coffey* case was cited and approved.

5. *United States v. 2,180 Cases of Champagne*, 9 F.(2d) 710 (C.A. 2, 1926). The defendant-claimant in this case had been tried and acquitted of attempted violation of the Prohibition Act by transporting liquor within territorial waters. The District Judge in the ensuing *in rem* action against the liquor decreed condemnation. The Circuit Court reversed, saying in part at page 712:

> "It is clear that the criminal charge was attempted violation of the Prohibition Act by transporting liquor within territorial waters, and the defense was that she was seeking a harbor of refuge. A necessary consequence of acquitting on this charge, after such a defense. was a holding in substance that on December 7th the crew of the *Zeehound* (including appellant) had no criminal intent and were running for refuge instead of running rum. Under the cases cited * * *, it is impossible for the Government to say (as it substantially attempts to do in one portion of this libel)—'You may have been running for a harbor of refuge without present intention of violating the Volstead Act, but we will hold you civilly for not having the manifest (R.S. Sec. 2806) and trying to smuggle liquor into the country.' It is quite unnecessary to discuss the

matter further, the principle is too well known; that it has not always met with approbation in the State courts (*People v. Snyder*, 90 App. Div. 422, 86 N.Y.S. 415) is unimportant."

6. *United States v. Gully*, 9 F.(2d) 959 (S.D. N.Y., 1922). Gully was acquitted of the criminal charge of importing liquor into the country. Subsequently the Government brought a forfeiture action against the liquor and the libel was dismissed on authority of the *Coffey* case.

7. *National Surety Co. v. United States*, 17 F.(2d) 369 (C.A. 9, 1927). One Osborne was discovered by prohibition officers in the act of transporting intoxicating liquor by automobile in violation of law. Upon criminal trial for unlawful possession and unlawful transportation of the liquor, Osborne was acquitted. The Government thereafter filed a libel *in rem* against the automobile. This court in a *per curiam* opinion, signed by Judges Gilbert, Rudkin and Dietrich, after quoting extensively from the *Coffey* case, held the criminal acquittal a bar to the forfeiture action.

8. *Castro v. United States*, 23 F.(2d) 263 (C.A. 1, 1927). Castro was acquitted of the criminal charge of unlawful possession of intoxicating liquor. The Government then brought an *in rem* action against the liquor for forfeiture. The court held (1) that the libel was defective in certain respects, not necessary to consider here, and (2) even if the libel were cured, the action would be barred by Castro's acquittal. In the course of its opinion, the court said:

"And the record in No. 3300, made a part of

the answer, discloses that the criminal information against Castro was dismissed shortly after the libel was filed and before the filing of the answer; and as the fact there put in issue—whether the liquors in question were lawfully possessed by the respondent (claimant here)—was one of the facts that would be put in issue by the libel, if properly drawn, the judgment of dismissal in the criminal action, the parties to the two proceedings being the same, would be conclusive as to the fact in the libel suit. *Coffey v. United States*, 116 U.S. 436, 443, 6 S. Ct. 137, 29 L. Ed. 634. In this situation the District Court was without authority to enter a decree of forfeiture and should have ordered the liquors returned to the claimant."

9. *United States v. 119 Packages, Etc. of Z-G Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936). In this case the Government brought an *in rem* action under the Pure Food & Drug Act.[1] Claimant of the merchandise moved to dismiss on the ground that his demurrer had been sustained in a previous criminal action instituted by the Government in the Northern District of Illinois. The court held that since it appeared that the demurrer in the previous action had gone to the merits rather than to a formal or technical defect, the prior criminal action was *res judicata*, and the libel was dismissed. The instant case is stronger than the cited case in that the record here

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[1]Except as hereinafter stated, there is no difference significant to this appeal between the Federal Food and Drugs Act of 1906 and the Federal Food, Drug and Cosmetic Act of 1938, which amended it. Therefore, we shall refer to the Acts simply as the Pure Food and Drug Act.

shows that the criminal case went to trial on the merits of the very issue which the Government now seeks to relitigate.

10. *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940). This case was an attempt by the Government, after *United States v. 119 Packages, Etc. Z-G Herbs, supra,* was decided, to obtain a decision contrary to that rendered by the New York district judge in that case. The same product and the same claimant were involved. The Sixth Circuit gave the Government short shrift in a unanimous decision. It followed the New York decision in holding the acquittal in the Illinois criminal case to be a bar to further libel actions:

> "Upon an appeal from a judgment rendered against the appellant for misbranding articles in violation of Section 8 of the Pure Food & Drug Law, 21 U.S.C.A. §10.
>
> "It appearing from the stipulation of facts that the articles sought to be condemned are the identical articles that formed the basis of an indictment against appellant in the District Court of the United States for the Northern District of Illinois, Eastern Division, in which court the indictment was, upon demurrer, dismissed because showing on its face that statements, designs or devices alleged to have been borne by the package were not statements of curative or therapeutic effect within the language of the statute, in consequence of which the indictment was held not constituting an offense against the United States, and it being the view of the court that the decision of the District Court of Illinois is *res judicata* of the present issues, the decision

there being upon the merits with respect to the charge of misbranding; it is hereby ordered that the judgment be and it is hereby reversed. *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 161, 3 A.L.R. 516; *United States v. Barber*, 219 U.S. 72, 31 S. Ct. 209, 55 L. Ed. 99; *Coffey v. United States*, 116 U.S. 436, 445, 6 S. Ct. 437, 29 L. Ed. 684. To the same effect is *United States v. 119 Packages, Etc.*, D.C. N.Y. 15 F. Supp. 327."

11. *United States v. One DeSoto Sedan*, 180 F.(2d) 583 (C.A. 4, 1950), affirming 85 F. Supp. 245 (E.D. N.C., 1949). One Smith was tried and acquitted of the crime of "removal, deposit and concealment of two gallons of distilled spirits upon which the duties to the United States had not been paid." Later the Government brought an action *in rem* to forfeit the automobile used by Smith in committing the alleged violation. The District Court dismissed the libel on the authority of the *Coffey* case. Upon appeal the Fourth Circuit affirmed. Its *per curiam* opinion, which at this writing is the latest on the subject, deserves to be quoted in its entirety:

> "This case cannot be distinguished from *Coffey v. United States*, 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 684; and the judgment below will be affirmed on the authority of that decision. 85 F. Supp. 245. It is argued that subsequent decisions of the Supreme Court have weakened the authority of the *Coffey* case; but that case has never been overruled. On the contrary, in one of the cases chiefly relied upon by the United States, the Supreme Court was at pains to distinguish it. See *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917."

In addition to the above eleven cases, federal courts elsewhere have recognized and approved the *Coffey* doctrine, but have held it inapplicable because one or more necessary elements were lacking.

The Supreme Court itself has on several occasions restated and approved the *Coffey* principle. Thus in *United States v. Zucker*, 161 U.S. 475 (1895), claimants in an *in rem* proceeding asserted that they had the right to be confronted with the witnesses against them in accordance with the Sixth Amendment of the Constitution. There had been no prior criminal action against them and the *Coffey* doctrine was therefore not directly in issue. The Court, in rejecting claimants' contention that the Sixth Amendment applied, after discussing the *Coffey* case, observed:

> "That case is an authority for the proposition that if the present defendants had been proceeded against criminally on account of the same acts and facts that must be shown in order to sustain this action under the statute of 1890, and had been acquitted, the verdict and judgment of acquittal would have barred a subsequent civil proceeding, based on the same acts and facts, and instituted to enforce a forfeiture or to recover the value of the merchandise forfeited."

We should also perhaps note in passing that the *Coffey* rule has been extended by several federal courts to cover other situations, but we believe it to be beyond the scope of this appeal to consider such cases. See as example cases: *United States v. Salen*, 244 Fed. 296 (S.D. N.Y., 1917); *Chin Kee v. United States*, 196 Fed. 74 (W.D. Tex., 1912).

Exhaustive research by appellee has not disclosed

a single federal case which has retreated in any way from the holding of the *Coffey* case where the necessary elements for its application have been present. Appellant has not cited and we have not found a SINGLE federal case brought under ANY federal statute holding that a civil *in rem* action for forfeiture can be maintained where the claimant has been previously acquitted of a criminal charge based on the same underlying facts.

II. *Res judicata* bars subsequent action under the Pure Food & Drug Act where the prior adjudication involved a different shipment of the identical product.

The parties to this action have stipulated to the following facts (See R. 21-23):

1. That the contents of the bottles involved in this proceeding are identical in all material respects with those involved in the criminal proceeding.

2. That the labeling in issue is in all material respects the same as that involved in the criminal action. In short, the branding of the bottles in the two actions is identical.

3. Walter W. Gramer, claimant herein, is the same person as the defendant in the previous criminal action.

4. The criminal action was decided in defendant's favor "after a trial on the merits of the issue of whether the drug was misbranded within the meaning of 21 U.S.C. 352(a)."

The charging paragraphs in both libels forming this consolidated action (Paragraph 3 of Cause No.

15432 (R. 4) and paragraph 3 of Cause No. 15426 (R. 11)) are almost verbatim the same as the charging paragraph in the criminal action (R. 25). The crux of each is an allegation, "That said drug, when caused to be introduced and delivered for introduction into interstate commerce as aforesaid * * * was misbranded within the meaning of 21 U.S.C. 352(a) * * *."

It is thus stipulated that all of the elements of the *Coffey* case are here present.

The sole question remaining for discussion is whether the doctrine of *res judicata* for purposes of Pure Food & Drug legislation applies to successive shipments of the same product. This question was emphatically answered in the affirmative by this court in *Geo. H. Lee Co. v. United States*, 41 F.(2d) 460 (C.A. 9, 1930).

In that case the Government contended that the dismissal of a libel covering a different shipment of the claimant's product could not be urged as *res judicata* of a separate and subsequent libel based upon a different shipment. Circuit Judge Dietrich, in an opinion in which he was joined by Judges Rudkin and Wilbur, dismissed the Government's contention in the following words:

> "Even were it held that technical identity in cause of action fails because the two proceedings relate to two different lots of the same compound and to labels or brands physically different though in form and meaning the same, it still remains true that the only real issue decided in the former proceeding is the one real underlying issue in the instant proceedings, that is, the re-

lation of a certain brand to a certain preparation, common to both suits. The case therefore is clearly within the narrowest application of the principle of judicial estoppel. In *Mitchell v. First National Bank*, 180 U.S. 471, 21 S. Ct. 418, 421, 45 L. ed. 627, the Supreme Court said:

" 'We are of the opinion that the bank was concluded by the judgment in the state court. In the recent case of *Southern P. R. Co. v. U. S.*, 168 U.S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18, 27, we said, after an extended examination of the adjudged cases, that "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them".'

"Manifestly the purpose of this principle or rule would be frustrated if the view for which the government contends were to be sustained. If the government is not bound by an adverse

> judgment, neither is the appellant. Hence, without modifying its formula or changing its labels, it could, notwithstanding the decree herein, ship its preparation into other territory, and indeed into the same territory, with the hope of a more favorable result elsewhere or next time should the government bring other libels. And, instead of 'peace and repose of society,' the result would be chaos and endless turmoil."

Accord: *United States v. 15 Cases of Bred Spred*, 35 F.(2d) 183 (C.A. 7, 1928).

It will be seen that the criterion used by this court in the first paragraph quoted was whether "the one real underlying issue * * * [is] common to both suits." This is the same test as that used by the Supreme Court in the *Coffey* case (See 116 U.S. 436, 441-444).

The Government evidently accepted the cue offered it in the last quoted paragraph from the *Lee* case and now itself invokes in its favor the doctrine which it contended against in that case. Thus in *United States v. 17 Cases, more or less, of Nue-Uvo*, 1 C.C.H. Food, Drug & Cosmetic Reporter, paragraph 7133 (N.D. Ill., Oct 11, 1949), the Government's motion for summary judgment was granted upon its showing that it had prevailed in a prior action against a separate shipment.

Some years after the *Lee Co.* case was decided, another case relating to the same claimant and posing the same issue was presented to the Eighth Circuit in a somewhat different context. There a previous libel action by the Government under the Pure Food and Drug Act had been dismissed, whereupon the Fed-

eral Trade Commission instituted administrative proceedings against the claimant concerning a separate shipment. Despite the fact that the charges instituted by the Federal Trade Commission were under an entirely separate statute and the procedure to be followed was different from that which was followed in the court action, the Eighth Circuit held without hesitation that the doctrine of *res judicata* applied. In so holding the court commented as follows:

> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties. If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceedings, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it.
>
> "The contentions of the respondent that the court in the libel proceeding merely determined that the petitioner had not intentionally misrep-

> resented the therapeutic qualities of its product, whereas the Commission in the proceedings before it ruled that the petitioner's representations were untrue and misleading, is not borne out by the record. The court in the libel proceeding determined that the representations, directly challenged and distinctly put in issue by the government, were not false, and, in doing so, necessarily determined that the product of the petitioner was a remedy for the three kinds of worms in poultry. The Commission, on the other hand, has determined that the representations upon which the libel proceeding was based were in fact false and misleading."

In conclusion, the court echoed the test used by this court in the prior *Lee* case and the Supreme Court in the *Coffey* case:

> "The main underlying issue in both the proceedings was the same, namely,—Are the representations made by the petitioner false because the product has not the therapeutic qualities claimed for it?" *Geo. H. Lee Co. v. Fed. Trade Comm.*, 113 F.(2d) 583 (C.A. 8, 1940)

The *Lee* cases were recently approved and followed in *United States v. Willard Tablet Co.*, 141 F.(2d) 141, 152 A.L.R. 1198 (C.A. 7, 1944) where a problem converse to that determined in the second *Lee* case was presented. There a hearing before the Federal Trade Commission had resulted in favor of the defendant. The Government then instituted a libel under the Pure Food & Drug Act against a subsequent shipment, alleging misbranding. The court sustaining the defense of *res judicata*, holding immaterial the fact that the procedure and proof before the Fed-

eral Trade Commission differed from that before the court. It pointed out that the true criterion of whether *res judicata* would apply was whether the underlying issues in both actions were essentially the same.

Another cogent opinion applying the doctrine of *res judicata* where the second cause of action is based on acts separate from the first is *Southern Pacific Co. v. Van Hoosear*, 72 F.(2d) 903 (C.A. 9, 1934). The latest United States Supreme Court decision applying the rule is *United States v. Munsingwear, Inc.*, 95 L. Ed. 70 (1950).

For purposes of the *Coffey* doctrine, acquittal in the criminal action is an adjudication of the "underlying issue," which is whether the defendant has committed the offense, and not merely whether the Government has been unable to prove its case beyond a reasonable doubt. To use a phrase from a Kansas opinion quoted by appellant at page 33 of its brief, the higher standard of proof "is either without any significance at all in this connection or decisive." Obviously the federal courts in the *Coffey* case and the eleven cases hereinbefore discussed which have applied it, regarded the higher standard of proof as being "without any significance at all." This fact is established conclusively by the language used in the eleven opinions.

Thus in *United States v. Gully*, 9 F.(2d) 959 (S.D. N.Y., 1922) the third count of the indictment in the criminal action was "that the defendant, Don Gully, imported and brought into the United States the liquor in question." The court in finding that acquittal on

this count barred a subsequent civil *in rem* action, said "by the verdict it was determined that he had not brought it [the liquor] into the United States." In *United States v. 2,180 Cases of Champagne*, 9 F. (2d) 710 (C.A. 2, 1926) the court said:

> "It is clear that the criminal charge was an attempted violation of the Prohibition Act by transporting liquor within the territorial waters and the defense was that she was seeking a harbor of refuge. A necessary consequence of acquitting on the charge after such a defense was a holding that in substance on December 7 the crew of the Zeehound (including appellant) had no criminal intent and were running for refuge instead of running rum."

The same rule of law is expressed in the *Coffey* opinion itself as follows:

> "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist."

The issue determined in the criminal action here was "whether the drug was misbranded within the meaning of 21 U.S.C. 352(a)" (R. 22). This is the very issue which appellant now seeks to relitigate. To paraphrase the opinions in the *Gully* and *Coffey* cases, it was determined by the decision of Judge Joyce in the criminal case that Sulgly-Minol was *not* misbranded within the meaning of 21 U.S.C. 352(a). In this case the record *affirmatively* shows that the decision in the criminal case was based on a finding

against the Government on the issue of misbranding, not on failure by the Government to prove its case beyond a reasonable doubt. Hence, the Government admits that the underlying issue raised in the instant civil proceeding was actually litigated and determined in the criminal case. The Government has stipulated that that issue was actually determined. Upon this record it matters not whether the prior proceeding was criminal, administrative, civil or even in admiralty! It was the trial judge's duty to dismiss the consolidated action, wholly apart from the particular application of the doctrine of *res judicata* known as the *Coffey* doctrine. Any contrary ruling would violate the most fundamental and general principles of *res judicata.* This principle has never been better expressed than in the language of the Supreme Court in *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48, 49 (1897), which is quoted with approval in *United States v. Munsingwear, Inc.*, at 95 L. Ed. 70, 71-2 (1950):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodifiied."

The final observation of the Supreme Court in the

Munsingwear opinion that, "The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation" (95 L. Ed. 73) applies with equal force to this case.

Appellant has stipulated that it has had its day in court on the very issue it raises here. It should not be allowed to relitigate that issue merely because the action in which the issue was adjudicated against it happened to be criminal in form.

III. Appellant's Brief

A. Introduction

The Government has referred at the outset of its argument to certain actions, which it concedes are irrelevant, against appellee and his product (App. Br. 8, 13-16). These allegedly include three seizure actions and one criminal action. After making such references, the Government states that it does not raise any issue as to whether these actions "could have any effect as *res judicata* in the present proceeding." (App. Br. 15). We regret that appellant has injected admitted irrelevancies into its brief. While we hesitate to dignify the Government's improper tactics with response, we shall make brief comment on these previous actions to clear the record of the inference which the Government obviously seeks to create.

The reason appellee did not defend the California and Texas seizure actions, which went by default, was that when they were instituted he was already litigating the instant consolidated action. The trouble of hiring and expense of paying counsel to attempt consolidation or to defend these actions outweighed

any advantage to be derived therefrom. We realize that the right of the Government to institute multiple libels has recently been upheld by a divided Supreme Court in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950). We recognize that such procedure is necessary to an effective administration of the Act in certain instances, particularly where there is adulteration. But we also believe that where, as here, the claimant has already secured a favorable ruling in the only prior contested proceeding, and where he is defending in good faith an action seeking to relitigate the same issue, no inference should be drawn by reason of his failure to hire counsel in distant places.

The Government concedes that a prior default judgment does not bar defense to later litigation based on a different cause of action. But it neglects to state the policy behind this rule, which is admirably expressed in Section 68 (d) of the Restatement of Judgments as follows:

> "If the defendant fails to interpose a defense in the prior action and judgment is given against him, the original cause of action is merged in the judgment; but there is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing a defense in the first action and for permitting plaintiff to obtain a judgment against him in that action. It may be that the action involved so small an amount that a defense to the action would cost him more than he would lose by failing to defend. It may be that the action is brought in a distant State where it would be difficult for him to produce the nec-

> sesary evidence of his defense. It would be most unjust to defendant to hold that his failure to defend should have the same result as though he had interposed a defense and it was found that the matters alleged in the defense were untrue."

The only purpose served by the California and Texas actions was to build up "the record" for the instant action. Obviously, those entrusted with enforcement of the Food & Drug laws must have the widest latitude of discretion as to whether to use the weapon of multiple seizure. We think that discretion abused where, as here, the weapon of multiple seizure is used for the sole purpose of inserting reference to such other actions in a brief where the Government concedes it has no legal relevancy.

Respecting the plea of guilty which is referred to on pages 13-14 of appellant's brief, the action there referred to was based upon labeling which appellee had abandoned and changed, at the request of the Pure Food & Drug Administration, even prior to institution of that action. The action was brought because appellee had inadvertently shipped a few bottles bearing the old label. His labeling has undergone several changes since that action was brought, most of which changes were made at the request of and with the approval of the Food & Drug Administration. Moreover, subsequent to the entry of the plea of guilty in that action, such plea was withdrawn with the approval of the court and substituted therefor was a plea of nolo contendere.

The entire purpose of such a plea is to protect the

defendant from having his plea, which amounts to a compromise construed as an admission against him in a subsequent action. See Housel & Walser, Defending and Prosecuting Federal Criminal Cases (2d ed. 1946), Sec. 302; 152 A.L.R. 253.

Again, the Government's remarks about appellant's product (App. Br. 12-13) are out of place since the merits of the product are not before this court. However, we wish to call the court's attention to two facts, (1) that Judge Joyce found for appellee "on the merits of the issue of whether" Sulgly-Minol was "misbranded within the meaning of" the Pure Food & Drug Act (R. 22) and (2) that sulphur, which is the basic element of Sulgly-Minol (R. 21) is generally regarded as efficacious in the treatment of rheumatic and skin diseases. Thus in Volume 21, page 543 of the current edition of the Encyclopedia Brittanica under "Sulphur" appears the following statement: "In chronic rheumatism sulphur waters are effectual both internally and as baths." It is also certainly within the knowledge and experience of this court that millions of Americans take "sulphur and molasses" as a spring tonic and at the first sign of a rheumatic complaint.

B. *Appellant's brief ignores distinctions between res judicata and double jeopardy.*

The Government's brief fails to analyze the distinction between the doctrines of *res judicata* and double jeopardy. This distinction, which is crucial to an understanding of the issue of this appeal, is made by the writer of an annotation at 147 A.L.R. 991, entitled

"Doctrine of Res Judicata in Criminal Cases," in the following terms:

> "While both the doctrine of *res judicata* and the plea of *autrefois acquit* involve the maxim 'nemo debet bis vexari pro eadem causa.' (*Com. v. Moon* (1943) 151 Pa. Super. Ct. 555, 30 A. (2d) 704, there are important differences between the two. On the one hand, jeopardy may attach, so as to support a plea of former jeopardy (but not one of *res judicata*), before the rendition of any judgment. See 15 Am. Jur. 46, Criminal Law, sections 369 *et seq.*
>
> "On the other hand, the plea of *res judicata* may be available in cases (for example, where there is no identity of offenses in the two prosecutions) in which a plea of former jeopardy, *autrefois acquit*, or *autrefois convict* could not be sustained."[2] 147 A.L.R. 991, 997

There are, of course, instances where *both* defenses apply, but the doctrine of double jeopardy can have no application here for several reasons. First, the defense cannot ordinarily be raised in an *in rem* proceeding, which, it is held, does not place the claimant in jeopardy. Second, and equally important, the episode or "offense" which forms the basis of this action, the placing of the goods in interstate commerce, is an "offense" distinct from that upon which the criminal action was based.

The classic statement of the doctrine of *res judicata*

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[2]Strictly speaking, the doctrine of double jeopardy is expressed in the Latin maxim "Nemo debet bis puniri pro uno delicto." Black's Law Dictionary (3rd ed. 1933) 1237. Thus, even the Romans recognized the distinction.

in criminal cases is the opinion of Mr. Justice Holmes in *United States v. Oppenheimer*, 242 U.S. 85 (1916), where he rejected the contention made by the Government that the doctrine of double jeopardy was intended to supplant the principle of *res judicata* in criminal cases. This doctrine has been recently applied in *Sealfon v. United States*, 332 U.S. 575 (1947). See also *Collins v. Loisil*, 262 U.S. 426 (1923); *Frank v. Mangrum*, 237 U.S. 309 (1915); McLaren, "The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases" (1935) 10 Wash. L. Rev. 198, *passim.*

The Government seeks to justify its intrusion of the doctrine of double jeopardy into this case on the theory that *Coffey v. United States* was decided on that ground rather than on *res judicata.* Its contention in this respect is self-defeating since it argues (a) the doctrine of double jeopardy cannot apply to a civil action, (b) *Coffey v. United States* was a civil action, and (c) *Coffey v. United States* was decided on the ground of double jeopardy. Apparently, it is appellant's view that the Supreme Court Justices who unanimously concurred in *Coffey* blunderingly misapplied the doctrine of double jeopardy and/or the scores of federal judges who have held *Coffey* to have been decided on *res judicata* committed mass judicial misinterpretation. But the misconstruction is solely appellant's. There are areas in which, as we have mentioned, the doctrines are not mutually exclusive. Appellant's brief seeks to capitalize on this fact.

Critical examination of the opinion of the Court in

the *Coffey* case reveals that the holding is squarely on the ground of *res judicata*. Thus, the Court said:

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in the criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*."

This choice of words is practically identical with the words used by the Supreme Court in its statement of the rule of *res judicata* in the leading case of *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1, 48, 49 (1897). The United States Supreme Court, in the most recent case in which it has applied *res judicata*, *United States v. Munsingwear, Inc.*, 95 L. Ed. 70 (1950), adopted and approved the language from the *Southern Pacific* case.

The sole reference to double jeopardy in the entire opinion of the Supreme Court in the *Coffey* case is its observation that one of the cases which it cites, *United States v. McKee*, 4 Dill. 128, was decided on that ground. How the court's observation that one of the cases it cites was decided on a certain ground can be parlayed into a statement that the case itself was decided on that ground is a mystery to us. The Government makes much of the fact that the case of *Stone v. United States* (See App. Br. 22) observes that the Court in the *Coffey* case cited

United States v. McKee. The *Stone* case goes no further. But again, the summation of the *Stone* holding at page 22 of the Government's brief is not a fair one. It should be remembered that the *Coffey* case was a holding that prior acquittal is a bar to a subsequent action for forfeiture *in rem.* The *Stone* case was not a forfeiture proceeding nor was it *in rem.* The real basis for the *Stone* case is summed up in *McLaren, supra,* at page 199, as follows:

> "Another interesting case is *Stone v. U.S.,* decided in 1897. That was a civil action in which Stone was being sued for conversion of certain timber which it was alleged he had cut and removed from the Government lands. He set up in bar that he had previously been acquitted by a jury on an indictment charging him criminally with the removal of the same timber. The Supreme Court refused to sustain this former acquittal as a bar. In doing so it is of interest to note that the court, as a 'makeweight,' pointed out that his acquittal in the criminal case might have been due to the difference in the degree of proof required in a civil and a criminal case, in this respect contradicting the opinion in the *Coffey* case. The real reason for holding the plea bad, however, was that: 'an essential fact had to be proved in the criminal case which was not necessary to be proved in the present suit,' referring to the fact that knowledge of the Government's ownership of the timber was an essential element in the criminal case. but was not an element of a civil liability for a conversion."

The *Coffey* opinion itself made it crystal clear that *res judicata* would not apply to a situation where in-

tent was a necessary element of one action but not of the other. The court said:

> "When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action."

In distinguishing the *Stone* case from the *Coffey* case, the court should keep in mind that intent is not an element in prosecution for shipment in interstate commerce of adulterated or misbranded goods. *Triangle Candy Co. v. United States*, 144 F.(2d) 195, 199 (C.A. 9, 1944) (construing 1938 Act); *Strong, Cobb & Co. v. United States*, 103 F.(2d) 671, 674 (C.A. 6, 1939) (construing 1906 Act). See *United States v. Johnson*, 221 U.S. 488, 497-98 (1911). It might be appropriate to mention that under the 1938 Act, section 333(b), if intent *is* found in a criminal action, the penalty may be increased. Intent is also not a necessary element to be proved in forfeiture proceedings under either the 1906 or 1938 Act.

Appellant is either unable or unwilling to understand the distinction between the doctrines of *res judicata* and double jeopardy. For example, it argues on page 42 of its brief that if a criminal case were terminated in conviction the Government would be barred from prosecuting a subsequent *in rem* pro-

ceeding involving a later shipment. On the contrary, under the doctrine of *res judicata*, the *defendant* would be barred from defending the subsequent civil action.

That the Supreme Court in the *Coffey* case held the *in rem* action barred by reason of prior adjudication rather than prior jeopardy is clearly evidenced by the following portion of the opinion, in which the court stated that the impact of prior *conviction* on a subsequent forfeiture proceeding was not before it:

> "Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence, in law, for a condemnation, in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence in law, for a conviction on a subsequent indictment under it, are questions not now presented."

If the *Coffey* case had been decided on double jeopardy, it would be immaterial whether the prior action ended in acquittal or conviction. The court's comment would be superfluous, since the subsequent action would be barred in either event. It should be borne in mind that the Government now takes the position in the administration of the Act, and the courts hold, that a prior judgment in the Government's favor in a forfeiture proceeding bars defense by the claimant in a later libel action involving a subsequent shipment. See *United States v. 17 Cases, more or less, of Nue-Uvo*, 1 C.C.H. Food Drug &

Cosmetic Reporter, paragraph 7133 N.D. Ill., Oct. 11, 1949). The same effect should be given to a prior conviction in a criminal action.

We have been unable to find a case where this precise issue has been passed on. But such a result is inferable from the opinion of this court in *Pinasco v. United States*, 262 Fed. 400, 402 (C.A. 9, 1920). In that case the court did not have to pass directly on the issue, but had this to say:

> "*Coffey v. United States*, 116 U.S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is authority for the proposition that an acquittal under an indictment under section 3257 is conclusive in favor of the accused on a subsequent trial of a suit *in rem* for forfeiture, where the existence of the same act or fact is the matter in issue. But that is far from saying that a conviction on an indictment under section 3257 may be availed of as a defense to a civil action for forfeiture based upon the same acts or transactions."

See also *In re Food Conservation Act*, 254 Fed. 893, 900-901 (N.D. N.Y., 1918).

The reason why the Government, having obtained a *conviction* in a case involving a prior shipment of the same product, could invoke the doctrine of *res judicata*, is that the underlying factual issue would already have been adjudicated in its favor. The following chart illustrates the limits within which the doctrines of *res judicata* and double jeopardy operate:

Same Episode

Criminal Action	*In Rem Action*
Acquittal	Government barred by *res judicata.*
Conviction	Claimant barred from defending by *res judicata.* Double jeopardy plea will not lie since claimant is not regarded as put in jeopardy by the *in rem* proceeding for purposes of Fifth Amendment. *Various Items of Personal Property v. United States,* 282 U.S. 577 (1930)

Separate Episodes

Criminal Action	*In rem Action*
Acquittal	Government barred by *res judicata.* Double jeopardy is not a defense, since while the "issue" is identical, the "offense" is distinct.
Conviction	Claimant barred from defending by *res judicata.* Double jeopardy is not a defense, since while the same factual issue is involved, the "offense" is distinct. Also, as stated above, claimant is not regarded as put in jeopardy.

The plea of double jeopardy is ordinarily limited to proceedings which are *criminal* in nature. The doctrine of *res judicata*, as applied to prior criminal actions, is not so restricted. It applies, the Supreme Court held in *Coffey v. United States*, to subsequent *civil in rem* proceedings for forfeiture of the defendant's product.

C. *Cases cited by appellant inapplicable*

The Government's brief relies almost exclusively upon five Supreme Court cases. These are *United States v. LaFranca*, 282 U.S. 568 (1931); *Various Items of Personal Property et al. v. United States*, 282 U.S. 577 (1934); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Murphy v. United States*, 272 U.S. 630 (1926); and *United States v. Nat'l. Assn. of Real Estate Boards*, 339 U.S. 485 (1949). We shall consider them in order.

Neither *Various Items* nor its companion *LaFranca* bears remotely upon the issue of this appeal. The issue in those cases was the impact of a prior *conviction* of defrauding and conspiring to defraud the United States of taxes on liquor, upon subsequent actions for forfeiture of a distillery (*Various Items*) and for a money penalty (*LaFranca*).

In the *Various Items* case the court rejected defendant's plea that his prior conviction was a bar *on the ground of double jeopardy. Res Judicata* was neither raised by defendant nor discussed. Of course, if it had been, it would have been by the Government, not the defendant, since the "acts and facts" put in

issue in the criminal case were determined in its favor.

In *LaFranca* defendant contended that the Government's action was barred by section 5 of the Willis-Campbell Act, the statute under which the proceedings were brought. That section provided that a conviction for an act or offense under the National Prohibition Act should be a bar to "prosecution" under the Willis-Campbell Act (282 U.S. 571). The Court was asked to find that the word "prosecution" embraced an action to recover a penalty, and that if such action were not embraced within the term "prosecution," that the Willis-Campbell Act was unconstitutional in that it sanctioned double punishment. The Supreme Court held that it was unnecessary to pass upon the constitutional issue since, in its opinion, the word "prosecution" as used in the Act, embraced an action for a money penalty. The decision, therefore, that the second action was barred turned entirely upon construction of section 5 of the Willis-Campbell Act. The opinion of the Court states at page 570 that "pleas of former jeopardy and of *res judicata* were overruled by the district court." There is no further reference in the entire opinion to the issue of *res judicata*. Again, as in the *Various Items* case, the proper party to raise the issue of *res judicata* would have been the Government and not the defendant.

It should be noted that neither opinion cites either the *Coffey* case nor any of the federal cases applying the doctrine laid down therein. The obvious reason for this was that the Government did not raise the is-

sue of *res judicata*, and there was no occasion to discuss the *Coffey* doctrine.

The cases of *Murphy v. United States*, 272 U.S. 630 (1926) and *United States v. Nat'l. Assn. of Real Estate Boards*, 339 U.S. 485 (1950) should be considered together since in each case the second action brought by the Government after prior acquittal in a criminal action was for *injunctive* relief. There is a sharp difference between actions of injunction and forfeiture. Each has its separate purpose. This fact was recognized by the authors of the Federal Food, Drug & Cosmetic Act of 1938 by the inclusion of both remedies. The purpose of an injunction is to enjoin a defendant from performing *future* unlawful acts. This is clearly recognized in both the *Murphy* and *Nat'l. Assn. of Real Estate Boards* opinions. Forfeiture proceedings, on the other hand, do not seek to prevent future unlawful acts, since the very basis of a forfeiture action is that an unlawful act has already allegedly been committed. In the case of the Pure Food & Drug Act the unlawful act is the introduction of a misbranded or adulerated article in interstate commerce.

This distinction is carefully drawn by the Court in the *Nat'l Assn. of Real Estate Boards* opinion in footnote 6 on page 493. There the Court in commenting on *Helvering v. Mitchell*, 303 U.S. 391 (1938) points out that the Court in the latter case considered the situation before it

> "distinct from *Coffey v. United States*, 116 U.S. 436, 29 L. Ed. 684, 6 S. Ct. 437 which held that the facts ascertained in a criminal case as be-

> tween the United States and the claimant could not be again litigated between them in a civil suit which was punitive in character."

Then the Court, distinguishing the injunctive proceedings which were before it, from the *Coffey* case, said:

> "The civil (injunction) suit aims to put an end to the restraint not to impose punishment for past acts." (Material in parenthesis supplied)

The crucial difference between the *injunctive* provision on the one hand and the *criminal* and *seizure* provisions on the other of the Food, Drug & Cosmetic Act of 1938, is that no *penalty* or *punishment* is contemplated by the injunctive provision unless, of course, the injunction is later disobeyed. The injunctive provision was introduced into the Pure Food & Drug Act by the Food, Drug & Cosmetic Act of 1938. Prior to that time the only means of enforcement were criminal and forfeiture actions. In 1937 several competing bills to amend the 1906 legislation were before the Congress. In its report to Congress for the year ending June 30, 1937, the Food & Drug Administration posed several questions regarding proposed changes to the then existing law. Included was the question of whether the proposed injunctive provision should be a substitute for or an addition to existing enforcement procedures. The Administration asked this question:

> "4. Should false advertising of foods, drugs, therapeutic devices and cosmetics be controlled through injunctions and cease-and-desist orders, *which carry no penalty* for the initial offense or for subsequent offenses up until the date the in-

> junction or order becomes effective, or should a deterrent to the commission of these offenses be set up by *providing penalties for their initial commission?*" (Italics supplied)

The above question was quoted from Toulmin, "A Treatise on the Law of Foods, Drugs & Cosmetics" (1942 Ed.) §4, pp. 12-13).

The foregoing question demonstrates that the Food & Drug Administration recognizes the distinction it now fails to draw. As the *Nat'l. Assn. of Real Estate Boards* opinion so clearly points out, the reason *Coffey* does not apply to *injunctive* proceedings is that *no penalty* is involved. It should hardly be necessary to reemphasize that the *Coffey* case itself was careful to limit the operation of its rule to cases where the particular penalty involved was the forfeiture *in rem* of the claimant's product.

The final case to be considered is *Helvering v. Mitchell*, 303 U.S. 391 (1938). Again we wish to quote the language of the Supreme Court in the *Coffey* case to show how carefully it delineated the boundaries of its ruling:

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a *judgment of acquittal* has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, *on a subsequent trial of a suit in rem by the United States*, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*" 116 U.S. 433 (Italics supplied)

Helvering v. Mitchell was nothing more or less than a straight application of the rule laid down by the Supreme Court in *Stone v. United States*, 167 U.S. 178 (1897). There the Court held that a civil *in personam* action brought primarily to reimburse the Government for financial loss would not be barred by prior acquittal. The following quotation from *Helvering v. Mitchell* demonstrates that the penalty sought to be recovered from Mitchell was regarded by the Court as reimbursement:

> "The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and *to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.*" 303 U.S. 401 (Italics supplied)

In both of the two latest cases relied upon by appellant, *Helvering* and *National Assn. of Real Estate Boards*, the court was careful to point out that its ruling did not detract from the *Coffey* doctrine. The very fact that the Supreme Court has always been careful to state that its rulings do not impinge upon *Coffey* is the best evidence that the *Coffey* doctrine is still the law. This was the very reasoning used last year by the Fourth Circuit in its decision in *United States v. One DeSoto Sedan*. 180 F.(2d) 583 (C.A. 4, 1950). In that case the Government made the same contention which it raises here, to-wit: that "more recent Supreme Court decisions have for practical purposes delimited the scope of the *Coffey* case

to the point of extinction" (App. Br. 10). In the course of its opinion the Fourth Circuit said:

> "It is argued that subsequent decisions of the Supreme Court have weakened the authority of the *Coffey* case; but that case has never been overruled. On the contrary, in one of the cases chiefly relied upon by the United States, the Supreme Court was at pains to distinguish it. See *Helvering v. Mitchell*, 303 U.S 391, 58 S. Ct. 630, 82 L. Ed. 917."

The Government, nothing daunted, urges on this court the same contention which was rejected by the Fourth Circuit and what is more, again uses *Helvering v. Mitchell* as its shibboleth.

D. *The Coffey principle applies to forfeiture proceedings under the Pure Food & Drug Act.*

Appellant's final effort to distinguish the *Coffey* case is based on its assertion that the forfeiture provision of the Federal Food, Drug & Cosmetic Act is not in the nature of punishment (App. Br. 36-41). This is a desperate attempt to tailor an argument to fit *Helvering v. Mitchell*, 303 U.S. 391 (1938), in which the Supreme Court declared that *Coffey* applies only to civil actions penal in character. In this phase of its argument, appellant overlooks that the courts have in fact applied the *Coffey* doctrine to the forfeiture provisions of the Pure Food & Drug Act. *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940), *United States v. 119 Packages, etc., of Z-G Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936). Since the *Stanley* decision was not rendered until some two years after *Helvering v. Mitchell*, the Sixth Circuit,

in reaching the conclusion it did, must have found that forfeiture proceedings under the Pure Food & Drug Act satisfy the requirements of *Helvering v. Mitchell* of a civil action penal in character.

To support its contention that the forfeiture sanction of the Act is "remedial" rather than "penal" or "punitive," appellant relies chiefly upon the language of 21 U.S.C. 334(d) (App. Br. 38-39). This provision permits the owner of a condemned article to recover his property under special circumstances by invoking the discretion of the court and by putting up a bond. Appellant asserts that inclusion of such a provision definitely places the forfeiture sanction of the Pure Food & Drug Act in the "remedial" category. By the same token, most, if not all of the statutes, under which the eleven cases previously cited by us arose, must also be classified as "remedial" since each of them contains provisions to the same effect as 334(d). For example, 18 U.S.C.A. 3617, formerly 18 U.S.C.A. 846, provides that in any proceeding for forfeiture relating to liquors, the seized articles may be returned to claimant under the same conditions as those outlined in the Pure Food & Drug Act.

Respecting appellant's further observation that the seizure and criminal provisions of the Federal Food, Drug & Cosmetic Act are independent of each other and thus that *Coffey* should not apply (see App. Br. 41-42), we invite the court's attention to the fact that in many of the cases in which the courts have held an *in rem* proceeding for forfeiture barred by prior acquittal, the first action, terminating in the prior ac-

quittal, had been brought under an entirely separate and distinct statute. It is true, as appellant has pointed out at page 41 of its brief, that the forfeiture and criminal provisions of the Federal Food & Drug Act of 1906 were held to be independent by the United States Supreme Court. But what appellant overlooks and ignores is that the *Stanley* and *Z-G Herbs* cases were decided contrary to its contention under the selfsame law, to-wit, the 1906 Act.

Appellant's brief fails to cite a single case holding that a forfeiture proceeding under *any* federal statute has ever been regarded as remedial in the sense that *Coffey* would not apply. Such proceedings are by their very nature penal and have been since Blackstone's day and still are so regarded. Thus, it is written at 50 Am. Jur. 34-5, Statutes, section 16:

> "The term (penal) is, however, frequently extended to include any action which imposes a penalty, *or creates a forfeiture,* as a punishment for the transgression of its provisions, or the commission of some wrong, or the neglect of some duty." (Italics and material in parenthesis supplied)

The similarity of this passage to the language used by Blackstone to express the same thought is striking. Blackstone said in 1765:

> "The same reason may with equal justice be applied to all *penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted.*" 3 Blackstone's Commentaries 161. (Italics ours)

All forfeiture proceedings are penal. It is impossible to argue, as appellant does, that some forfeiture pro-

ceedings are penal and some remedial. While it is true that Pure Food & Drug legislation is remedial in that its overall purpose is to protect the public, the same thing may be said of every piece of legislation containing criminal or civil sanctions. No law is passed for the sole purpose of inflicting punishment. However, many laws remedial in their overall purpose contain penal sanctions by means of which the legislature hopes that the remedial purpose of the legislation will be achieved. An outstanding example of this type of statute was the Volstead Act. The purpose behind insertion of forfeiture sanctions in that Act (41 U.S. St. at L. 315, 85 c. 85, Tit. II, §§25-27) was precisely the same as the purpose for which, appellant contends, forfeiture sanctions were included in the Pure Food & Drug Act. Just as misbranded drugs must be seized before they reach the consumer, so, the proponents of the Volstead Act asserted, intoxicating liquors were inimical to public health and their seizure was necessary to protect the consumer. Since several of the eleven cases applying the *Coffey* principle, which we discussed in the first part of this brief, were brought under the Volstead Act, it is clear that there is no merit in the hairsplitting distinction for which appellant contends.

Appellant asserts in its brief that the *Coffey* doctrine cannot apply here since the object of the instant consolidated action is to arrest the goods and not to punish the owner. Again, appellant is confronted with the fact that the courts in the aforementioned eleven cases applied the *Coffey* doctrine, although at the same time rendering lip service to the fiction that it

was the goods which were being punished. Any distinction between the punishment of a product and its owner is unrealistic. In this connection, the case of *United States v. Kent Food Corp.*, 168 F.(2d) 632 (C.A. 2, 1948) may be helpful. There the question presented was whether food condemned as adulterated in interstate commerce under Section 334 of the Act could be released for export. The trial judge decreed such release since it appeared that the food which was condemned was perfectly edible even though the mold count was higher than permitted under our food regulations. The Government's argument on appeal was "the court's holding has the effect of destroying the efficiacy of the original order of condemnation, since it permits and encourages *persons* subject to the Act to gamble upon compliance, knowing that *the penalty for violation* will be only an order for sale in the export trade" (168 F.(2d) 633) (Italics supplied). It will be seen that the Government recognizes that the real object of a forfeiture action, stripped of legal fiction, is to inflict a penalty on the person who places the goods in interstate commerce.

On appeal, Judge Clark, speaking for a unanimous court, reversed the trial judge. In the course of his opinion he said:

> "The power specifically given to the court to do only certain things upon condemnation of the articles excludes the possibility of according them a status they might originally have had, had they never been introduced into interstate commerce for the purpose of domestic sale. The clear purpose of the statute appears to be to visit the statutory penalties or sanctions upon articles

> thus found to be in violation of its provisions (Citing cases). The practical aspects of the situation would seem to support an intention that a violator of the Act may avoid the consequences of his wrong by thus exporting the outlawed goods to some foreign country which will receive them."

The court in speaking of a violator avoiding "the consequences of his wrong" recognizes that for all practical purposes the punishment is inflicted on the violator and not on the goods. See Toulmin, *supra*, §71, pages 95, 96. Also the *in rem* quality of a libel proceeding under the Act is dropped for all procedural purposes when a claim is filed by the owner of the goods. Moreover, under section 304(d) of the Act, upon condemnation, the property may be sold by the Government and "the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States." Manifestly, if the sole purpose of the Act were "remedial" the avails of sale in excess of legal costs and charges would be returned to claimant.

It is not surprising that differing effect is given to acquittal in a prior criminal action where the second action is limited to the recovery of a sum of money in the nature of a penalty or in the nature of reimbursement to the Government and where the second action is *in rem* for forfeiture of property. Actions *in personam* to recover damages in the nature of a penalty and *in rem* for forfeiture of property are by their very nature entirely different. See 37 C.J.S. 5, Forfeitures, section 1. From earliest times forfeitures

have been looked upon with disfavor by the law and have been enforced reluctantly and only when within both the spirit and letter of the law. See cases under Federal Digest, Forfeitures, section 1. The attitude of courts towards this type of proceeding is summed up in the maxim, "The law abhors a forfeiture."

Historically, seizure of a citizen's property by the sovereign was one of the great grievances against despotic power. The seriousness with which the founders of this country regarded this problem is reflected by their inclusion of the Fourth Amendment in the Bill of Rights. No one can say with assurance whether the present distinction for purposes of the doctrine of prior adjudication between forfeiture and penalty proceedings is a direct outgrowth of those early fears, but such connection is plausible. In any event, as this brief demonstrates, the distinction does exist. Any departure from it would necessarily involve a repudiation of the *Coffey* case and the long and unbroken line of federal decisions which have applied the distinction during the past 65 years to every type of federal statute under which a forfeiture proceeding has been brought.

IV. Conclusion

Appellant's brief, indeed its case, is essentially a petition for rehearing.

First, the libels seek a rehearing of the issue of whether Sulgly-Minol is "misbranded within the meaning of 21 U.S.C. 352(a)" (R. 22).

Second, appellant seeks a rehearing of its contention, decided adversely to it by the Sixth Circuit in *Stanley v. United States*, 111 F.(2d) 898 (C.A. 6, 1940) and by the Southern District of New York in *United States v. 119 Packages, etc. of Z-G Herbs*, 15 F. Supp. 307 (S.D. N.Y., 1936), that the *Coffey* principle does not apply to the Pure Food & Drug Act.

Third, appellant seeks a rehearing of its contention, previously rejected by the Fourth Circuit in *United States v. One DeSoto Sedan*, 180 F.(2d) 583 (C.A. 4, 1950), that the *Coffey* case was overruled *sub silentio* by *Helvering v. Mitchell*, 303 U.S. 391 (1938).

Fourth, appellant, by implication at least, urges this court to reconsider its holding in *George H. Lee Co. v. United States*, 41 F.(2d) 460 (C.A. 9, 1930) that *res judicata* applies to successive shipments of the same product under the Pure Food & Drug Act.

Appellant even voices the traditional complaint of the petitioner for rehearing. It says since the *Stanley*, *Z-G Herbs* and *One DeSoto Sedan* opinions were short and adverse to it, the courts surely must have neglected to give sufficient consideration to the arguments it now re-raises. The reason why the opinions are growing shorter and shorter when courts are asked by the Government to find that a prior acquittal on a criminal charge is not a bar to a subsequent civil *in rem* forfeiture proceeding is clear. It is not that insufficient consideration is given to the Govern-

ment's arguments, but rather that the law on the subject is now so well settled as to render extended discussion unnecessary.

Respectfully submitted,

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Attorneys for Appellee.

No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER W. GRAMER, Claimant of 213 Bottles, etc.,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington Northern Division.

Honorable John C. Bowen, Judge.

REPLY BRIEF OF APPELLANT.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Walter W. Gramer, Claimant of 213 Bottles, etc.,

Appellee.

REPLY BRIEF OF APPELLANT.

I.

Judicial Standing of Coffey Case.

Appellee asserts there is not "a single federal case which has retreated in any way from the holding of the *Coffey* case where the necessary elements for its application have been present." [Appellee's Br. 11-12.]

The authorities discussed in our main brief demonstrate the inaccuracy of this statement. Some courts have simply acquiesced in the rule of the *Coffey* case. Some courts have indicated a reluctant acquiescence. Some courts have applied the rule tersely without comment. A number of courts have given thoughtful consideration to the case and have gone to great lengths to distinguish it.

United States v. One Dodge Sedan et al., 113 F. 2d 552 (C. A. 3, 1940), presents perhaps the most stimulating and scathing appraisal given to the *Coffey* holding by any federal court. On page 552, the Court said:

> "The learned district court rendered its judgment with obvious reluctance. That reluctance appears both in its opinion and in the colloquies. It felt itself bound by the decision of the United States Supreme Court in the case of Coffey v. United States, 116 U. S. 436 . . . That case has received a distinctly 'unfavorable press.' [Citing authorities in footnote.] It has also suffered by implication, at least, in later decisions of the same tribunal. [Citing cases in footnote.] These cases certainly limit its holding to the particular facts. One has indeed the impression that only the shibboleth of '*stare decisis*' has saved it from express repudiation.
>
> "We think that the particular facts of the principal case give us the necessary loophole and in so thinking we must disagree with the learned district judge."

Here then is a rule of law that is so distasteful as to inspire the courts to seek a loophole to get around it. After discussing the doctrines of former jeopardy and *res judicata* and the functions they serve in the law, the Court continued on page 554:

> "The application of these general ideas to the case of a criminal prosecution followed by a civil suit has not been easy. Its difficulty has been enhanced by considerable confusion in the authorities. There has

been a tendency to vacillate between jeopardy and judicata, between the character of the charge and the character of the proof. Some cases emphasize the remedial nature of the second action. [Citing Murphy v. U. S., 272 U. S. 630, and Helvering v. Mitchell, 303 U. S. 391.] Others stress the difference in the degree of proof required. [Citing Stone v. U. S., 167 U. S. 178; U. S. v. Schneider, 35 F. 107; U. S. v. Donaldson-Shultz Co., 148 F. 581.] It is not our place to resolve these doubts and difficulties.

"As we have said, the Coffey case has not been expressly overruled. It is nevertheless left in a tenuous position. A prior conviction has been held not to bar forfeiture, Various Articles of Personal Property v. U. S., 282 U. S. 577. So also the *res judicata* theory of it and earlier cases seems to have been disapproved. Stone v. U. S., 167 U. S. 178; Murphy v. U. S., 272 U. S. 630; Helvering v. Mitchell, 303 U. S. 391. Whether or not that disapproval has gone far enough to be followed by the 'inferior courts' is not necessary to presently decide."

Having expressed its views on the *Coffey* case, the Court then pounced on the "loophole" which enabled it to distinguish the *Coffey* case—namely, that the claimant in the *Dodge Sedan* case was not the same person who had been previously acquitted, but the wife of that person.

We submit that the tendency of the Courts *is* to "retreat" from the *Coffey* case wherever possible.

II.

Distinction Between Instant Case and Coffey Case.

Appellee's argument is that the present case is on all fours with the *Coffey* case and that the *Coffey* case is decisive here.

In our main brief, however, we pointed out a significant distinction between the two cases. [Br. 38-41.] The *Coffey* case was an *in rem* proceeding with the objective of forfeiting certain property to the Government. The present case is an *in rem* proceeding under the Federal Food, Drug, and Cosmetic Act with the objective of condemning an allegedly violative drug; *but section 304(d) of the Act* [*21 U. S. C. 334(d)*] *expressly permits the owner of a condemned article to be given an opportunity to salvage it if it can be brought into compliance with the Act.* Thus it is clear that the statute in the *Coffey* case involved the unequivocal deprivation of property, while the statute in the present case permits a complete salvaging of the property by the owner upon reasonable terms. To put it another way, the *Coffey* case inflicts a penalty, while the statute here involved is designed primarily to bar consumer deception or injury.

By a misleading discussion of *United States v. Kent Food Corp.*, 168 F. 2d 632 (C. A. 2, 1948), cert. denied 335 U. S. 885, Appellee attempts to prove that the seizure provisions of the Federal Food, Drug, and Cosmetic Act are penalizing in nature. [Appellee's Br. 43-44.] The *Kent* case involved the seizure of catsup that was adulterated by reason of a high mold count. Concededly, the adulteration could not be cured. Claimants consented to a decree of condemnation but requested the Court to

permit export of the catsup to a foreign country, and the District Court so ordered on the theory that 21 U. S. C. 381(d)[1] would immunize the product from the adulteration provisions of the Act. But the Court of Appeals reversed on the ground that 21 U. S. C. 381(d) gives an exemption from the adulteration provisions of the Act *only to those products which are bona fide marketed for export in the first place.* The trial court had found "that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market." [Page 633.] The appellate court concluded that the vendor of an adulterated product could have only one bite at the apple; if he attempted to palm off such a product in the domestic market and was apprehended in the attempt, the salvaging provisions of 21 U. S. C. 334(d) would not authorize him thereafter to export the product pursuant to the exemption in 21 U. S. C. 381(d). In the *Kent* case, the essential point is that the product could not be brought into compliance with the adulteration provisions of the Act. Under such circumstances, salvaging was not possible.

---

[1]21 U. S. C. 381(d) provides:

"A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter."

III.

The Stipulation.

Appellee's brief [pages 19-22] gives an entirely unwarranted interpretation of the Stipulation entered into in this case. *The Government did not stipulate* that "the issue determined in the criminal action here was 'whether the drug was misbranded within the meaning of 21 U. S. C. 352(a).'" *It is not true* that "the record affirmatively shows that the decision in the criminal case was based on a finding against the Government on the issue of misbranding, not on failure by the Government to prove its case beyond a reasonable doubt." *The Government does not admit* "that the underlying issue raised in the instant civil proceeding was actually litigated and determined in the criminal case," *nor has "the Government stipulated* that that issue was actually determined."

There is no basis whatsoever for the inferences Appellee derives from the Stipulation. We quote the pertinent part of the Stipulation [R. 22]:

> "Subsequent to the filing of the information in said Cause No. 7984, Walter W. Gramer entered a plea of not guilty and after a trial on the merits of the issue of whether the drug was misbranded within the meaning of 21 U. S. C. 352(a), the United States District Court of Minnesota, Fourth Division, adjudged Walter F. Gramer not guilty of the crime charged by the said information, pursuant to which the judgment of dismissal, a copy of which is annexed hereto as 'Exhibit B' was entered therein."

This Stipulation is not complex. It recites that there was a trial on the merits in the criminal case and that the defendant was held to be not guilty of the crime charged in the Information. The Stipulation waives no rights of the Government here and does not purport to probe the mental reactions of the Court in the criminal case. The judgment of that Court speaks for itself. [R. 26.] Whatever issues were resolved by that Court were presumably decided upon the Court's belief that the Government had failed to prove every material allegation of fact *beyond a reasonable doubt.*

It was never the Government's intention to enter into a Stipulation such as Appellee now conjures up, and no such Stipulation was in fact entered into. Furthermore, such a Stipulation would be inconsistent with the Government's entire position in this proceeding. For example, the Government's Motion to Strike the Affirmative Defense in the Answers [R. 19] says in part:

> "Said defense is insufficient since the judgment of dismissal in a criminal case, where the burden of proof is 'beyond a reasonable doubt,' can not be *res judicata* in the instant consolidated action where the burden of proof is 'by a preponderance of the evidence.' "

We submit that Appellee's argument with respect to the Stipulation is wholly frivolous.

IV.

Miscellaneous Points.

Appellee's brief [pages 13-14] cites the case of *George H. Lee Co. v. United States,* 41 F. 2d 460 (C. A. 9, 1930). There this Court decided that an adjudication in a *seizure* action under the Insecticide Act of 1910 is *res judicata* in a *subsequent seizure* action involving another shipment of the same product. This is a far cry from the present case where Appellee argues that an acquittal in a *criminal case* is *res judicata* in a subsequent *seizure case.*

Appellee's brief [pages 21-22] charges that the Government in its brief improperly referred to prior actions involving Mr. Gramer and his product, Sulgly-Minol. We believe it entirely proper that this Court should view the instant litigation in its complete setting, and not *in vacuo.* Especially is this true when the prior actions are reflected in official documents of which the Courts take judicial notice. [See Appellant's Br. p. 14, footnote 2.]

Appellee's brief [page 23] refers to the *first* criminal prosecution of Mr. Gramer which resulted in his conviction. The violation there involved was not inadvertent and, as reflected in Drugs and Devices Notice of Judgment 2281, it resulted in substantially the same charges of misbranding as are made in the present case. The assertion that the Food and Drug Administration has approved Mr. Gramer's labeling is untrue. We have investigated the statement that Mr. Gramer withdrew his plea of guilty in the above case and substituted a *nolo contendere* plea. We are advised by the Clerk of the United States District Court for the District of Minne-

sota that there is no record in the Court files of any such change of plea.

Appellee's brief [page 23] charges that the Government abused its discretion in making a number of seizures of Sulgly-Minol and that the sole purpose of such seizures was to insert reference to them in our brief in this appeal. While this charge is absurd on its face, we ask this Court to consider the facts as revealed by the Notices of Judgments discussed on pages 13-14 of our main brief:

> (1) On November 3, 1947, Mr. Gramer pleaded guilty in a criminal prosecution in the District of Minnesota involving Sulgly-Minol.
>
> (2) On August 9, 1948, a shipment of Sulgly-Minol was condemned and destroyed in the Western District of Wisconsin.

The charges in both of these proceedings related to false and misleading therapeutic claims substantially the same as involved in subsequent litigation. Under 21 U. S. C. 334(a)(1), there is no limitation to the number of seizure actions that may be brought "when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act." This is entirely different from the situation in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 [referred to in Appellee's brief on page 22], where there had been no prior adjudication and where multiple seizures were predicated upon an administrative determination of "probable cause" under 21 U. S. C. 334(a)(2).

In the instant situation, where there had been a prior plea of guilty and a default decree of condemnation and

destruction, the Government would have been remiss if it had not acted to protect the public from further deception. Sulgly-Minol is offered as an effective remedy for arthritis, rheumatism, boils, and acne. [R. 27-32.] As this Court knows, persons who are unfortunately afflicted by such ailments are often victimized by vendors of nostrums.

> *Research Laboratories, Inc. v. United States,* 167 F. 2d 410 (C. A. 9, 1948), cert. den. 335 U. S. 843;
>
> *Alberty Food Products Co. v. United States,* 185 F. 2d 321 (C. A. 9, 1950);
>
> *Colgrove v. United States,* 176 F. 2d 614 (C. A. 9, 1949), cert. den. 70 S. Ct. 349.

All of the seizure actions against Sulgly-Minol were instituted months before the lower court's decision in this case. The sole purpose of those actions was to protect the public, not "to build up the record" here. Furthermore, Appellee could easily have effected consolidation of the seizure actions pursuant to 21 U. S. C. 334(b).

Appellee's brief [page 7] cites *United States v. Gully,* 9 F. 2d 959 (S. D. N. Y.). It is quite true that the libel there involved was dismissed on authority of the *Coffey* case. We think it pertinent, however, to quote the remarks of Judge Learned Hand, then District Judge, in reluctantly dismissing the libel to forfeit a boat:

Page 960:

> "It is clear to me that there was reasonable cause, and more than reasonable cause, for the libel in the first instance. Indeed, I may go further, and say that I never saw a clearer case of the violation of three of the sections here in question, though that has

> unfortunately nothing to do with the disposition of the case. I need hardly say that it is quite out of place for me to express any opinion as to whether the case of Coffey v. United States was correctly decided or not. That, of course, is a question which only the Supreme Court can reconsider."

Judge Hand could not distinguish the *Gully* case from the *Coffey* case. However, the instant case is readily distinguishable as we have demonstrated, and should be distinguished in the public interest.

Respectfully submitted,

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No. 12,750

United States Court of Appeals

For the Ninth Circuit

LUCILLE McGAH, E. W. McGAH, CAROLE O'SHEA AND JOHN P. O'SHEA,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

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Pernau-Walsh Printing Co., San Francisco

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United States Court of Appeals
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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' OPENING BRIEF.

THE JURISDICTION OF THIS COURT.

The petitioners are residents of the Northern District of California and duly filed their income tax returns for the calendar year 1944 with the Collector of Internal Revenue for the First District of California, all within the jurisdiction of this Court.

The Petition for Review by this Court was filed pursuant to Sections 1141 and 1142 of the Internal Revenue Code to review the decision entered by the Tax Court of the United States on July 31, 1950 (15 T.C. No. 11) determining deficiencies in the petitioners' respective income tax returns for the calendar year 1944 in the following amounts: Lucille McGah, $8,452.01; E. W. McGah, $8,452.00; Carole O'Shea, $2,337.28 and John P. O'Shea, $2,337.30 (Tr. p. 88).

SCOPE OF THE REVIEW BY THIS COURT.

Now that I.R.C. Sec. 1141 (a) has been amended (Sec. 36, Act of June 25, 1948, P.L. 773, 80th Cong. 2nd Sess. effective Sept. 1, 1948), the rule of the *Dobson* case (320 U.S. 489, Rhg. Den. 321 U.S. 231) has been abrogated. Under the law now in effect, this Court may review decisions of the Tax Court in the same manner and to the same extent as decisions of a District Court tried without a jury.

Rule 52 (a) of the Federal Rules of Civil Procedure, provides, *inter alia,* that, in all actions tried upon the facts without a jury, findings of fact shall not be set aside *unless clearly erroneous,* due regard being given to the opportunity of the trial court to judge the credibility of the witnesses.

A finding which *is* clearly erroneous *can* be set aside and *should* be set aside.

And errors of law should, of course, be corrected.

NATURE OF THE CONTROVERSY.

In 1944, San Leandro Homes, a partnership, of which Petitioners E. W. McGah and John P. O'Shea were partners, sold 14 of 95 homes which they built for rental to defense workers and which had been used in the partners' house rental business rented continuously since their completion to a total of 156 defense worker tenants prior to the sale of the first home, the sale having been made as the houses became vacant under pressure from the Bank from which the partnership sought to borrow more money.

The partners reported the gain from the sale of the 14 homes as a long term capital gain under the provisions of I.R.C. Sec. 117 (j).

The Respondent claims that the gain should have been reported as ordinary income.

The Tax Court made a finding of fact (claimed by Petitioners to be clearly erroneous) that just prior to the sale of the first of the 14 homes on August 1, 1944, the partners "*abandoned*" their purpose of holding the 95 homes primarily for rental and investment and that thereafter and at the time of sale were holding the homes primarily for sale to their customers in the ordinary course of their trade or business.

Sec. 117 (j) of the Internal Revenue Code provides, so far as material here, as follows:

> "(j) GAINS AND LOSSES FROM * * * THE SALE * * * OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS.—
>
> "(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term '*property used in the trade or business*' means * * * *real property* used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *.
>
> "(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, * * * exceed the recognized losses from such sales, * * * such

gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *"

The Petitioners claim, as hereinafter shown, that the Tax Court's specified findings are *clearly erroneous* and contrary to the evidence and that it has misconstrued the meaning and legal effect of I.R.C. Sec. 117 (j).

STATEMENT OF THE CASE AND STATEMENT OF THE QUESTIONS INVOLVED.

The relevant facts, shown by the record, many of them *stipulated,* are as follows:

San Leandro Homes is a partnership formed August 31, 1942 by petitioners E. W. McGah and John P. O'Shea, (Stipulated) (Tr. 147) for the purpose of erecting 169 homes for defense workers in San Leandro, California (Stipulated) (Tr. 155). The partnership articles recite that it contemplated *rental* rather than the sale of these homes (Stipulated) (Tr. 154-155).

The partners held their respective interests in the partnership as community property with their respective wives, petitioners Lucille McGah and Carole O'Shea (Stipulated) (Tr. 147-148). In 1944, husband and wife each reported one-half of the partner's share of partnership income for Federal income tax purposes (Stipulated) (Tr. 148).

The partnership, in order to obtain materials for the 169 houses, applied to the Office of Production Management at San Francisco (Stipulated) (Tr. 160-164) for

priorities for 169 *rental* units, 100 to *rent* at $50.00 per month and 69 units to *rent* at $39.99 per month (Stipulated) (Tr. 163).

Delmar Goforth, an original associate of petitioners, withdrew from the venture when he learned that 169 *rental* units were to be built (Testimony) (Tr. 113).

The partnership sought allocations for 169 units scheduled to *rent* for $50.00 per month each (Testimony) (Tr. 117), but actually obtained 69 allocations for units to *rent* at $39.99 per month and 100 units scheduled to *rent* at $50.00 per month each (Stipulation) (Tr. 163).

The reason for the allocations for the 69 *rental units* to *rent* at $39.99 per month (instead of $50.00 per month) was because the Office of Production Management then had only 100 allocations for $50.00 per month rental units left (Testimony) (Tr. 116-117).

However, the partnership was told by Mr. Liggett, Assistant Chief Underwriter of the Federal Housing Administration, that more allocations for $50.00 per month *rental* units were expected and when they were available would be *substituted* for the 69 units scheduled to *rent* for $39.99 per month (Testimony) (Tr. 141-142-143; 116-117).

When the partners went back to the Federal Housing Administration about 6 months later, to effect the promised substitution, they were told that the expected allocation of more $50.00 *rental* units had not come through so that the partners would either have to stay by their $39.99 rental units, *or*, sell them (Testimony) (Tr. 118-119).

During the period between approximately September 12, 1943 and approximately February 1, 1943, the partnership constructed and completed the 169 dwelling houses (Stipulation) (Tr. 148).

All of the 169 houses built were identical in floor plan and in square footage content. The elevations were different (Testimony) (Tr. 114; 137-138). $4,000.00 was borrowed to provide the cost of each of the 169 lots and the houses erected thereon (Testimony) (Tr. 114-115).

All of the money for the construction of the 169 homes by the partnership was borrowed from Central Bank (Testimony) (Tr. 114-115). These loans were adequate for the cost of constructing the homes and paying for the lots upon which they were constructed (Testimony) (Tr. 114-115). *The loans were all 100% loans* (Testimony) (Tr. 115) (Stipulation) (Tr. 153).

The reason why the partnership did not want to rent units at $39.99 per month was that with a pay-back of around $33.00 per month plus maintenance at $6.00 or $7.00 per month, they would have had a *loss* on the 69 houses renting at $39.99, and *that is the only reason why they sold the 69 houses* (Testimony) (Tr. 118-119).

The partnership sold a total of 74 of the 169 houses before its rental operations began. The reason why 74 instead of only the 69 houses (scheduled to rent at $39.99) was that the sale of 74 houses left the partnership with a complete unit of 95 houses for rental, all on one side of a boundary street (Testimony) (Tr. 117).

These 74 houses sold included the 69 houses with rentals fixed at $39.99 per month. None of said 74 houses

so sold was ever rented by the partnership or used by it in connection with any rental operation prior to the sale thereof. The profit realized from the sale of said 74 houses was reported by said partnership as ordinary income (Stipulation) (Tr. 149) and is not involved here.

The partnership made its decision to sell these 74 houses about 3 or 4 weeks before the first of the 74 houses were sold which was after learning from Mr. Liggett of the Federal Housing Administration that there would be no substitutions of $50.00 rental units for the $39.99 rental units (Testimony) (Tr. 142-143).

74 of the 169 houses were sold without ever being rented. The remainder of said 169 houses, viz., 95 houses were rented by said partnership from and after on or about March 15, 1943 to persons engaged in National Defense activities. *From March 15, 1943 until August 1, 1944, said 95 houses were rented to 156 different tenants* (Stipulation) (Tr. 150).

The partnership would have kept the whole 169 houses and would not have sold any if it could have gotten all to rent at $50.00 per month each (Testimony) (Tr. 125).

The partners, in retaining and renting these 95 houses, *intended to hold them for rental and investment* (Testimony) (Tr. 124; 128-129). They rented the 95 units because it was a good investment (Testimony) (Tr. 125).

The partnership contemplated a rental venture from the very beginning—at the time of applying for the priorities (Testimony) (Tr. 129-130). The sale of the houses was not then contemplated (Testimony) (Tr. 140).

At the time the partnership accepted the allocation of priorities for the 69 units to *rent* at $39.99 it could have gotten allocations for houses for *sale, if it cared to* (Testimony) (Tr. 144).

At the time the partnership made its application for preference ratings on materials, *it was the full intention of the partners to embark on a rental project,* because it looked as if it would be a very advantageous one to the partners financially, inasmuch as they could secure 100% loans from the bank through F.H.A. insurance and by so doing they could receive 100% on no investment at all (Testimony) (Tr. 129).

The rental of said 95 houses was carried on by the partnership from an office which the partnership maintained for that purpose located at No. 1411 Davis Street, San Leandro, California. The houses were let on oral month-to-month tenancies at $50.00 per month. A commission of $10.00 per house was paid to an agent for renting. The rental operations were conducted by a lady employed for that purpose at the partnership's aforesaid office. She looked after all rental matters, including any complaints, collections and the like (Stipulation) (Tr. 150). Annexed to the stipulation and marked EXHIBIT "3", is a detailed statement of the receipts and disbursements of said partnership from said rental operations as shown by the partnership books, for the fiscal years of the partnership *commencing* October 31, 1943 and *ending* on the 31st day of October, 1949 (Stipulation) (Tr. 167):

These *stipulated* figures are both interesting and important. They show:

(a) that during the fiscal years 1943 to 1949, both inclusive, the partnership collected gross rentals in the sum of $212,166.01 from these rental units;

(b) that during these *seven years* they derived a *net rental income* of $12,171.00 from these houses and, in addition, *retained as tax free dollars,* on account of depreciation a total of $73,774.14 and in addition, provided for F.H.A. trust funds out of gross rentals in the total sum of $33,047.48, after paying all other expenses.

It will be borne in mind that it is also *stipulated* that these houses were built with 100% F.H.A. loans (Tr. 152-153) and that the partners originally *contributed* $13,500.00 in cash to the venture and that between December 1942 and August 1943 *withdrew* $88,725.00 therefrom (Tr. 153-4).

There was thus a *net rental income* in the 7 years of $12,171.00 on an investment of $13,500.00 which was the good investment that the partners testified to.

The stipulated facts show that in 1948 and 1949, when the partnership was still renting 35 houses, the depreciation allowance for each year was the same,—$7,041.34 (Tr. 167, last two columns).

Dividing $7,041.34 by 35 houses gives annual depreciation per house of $201.80. *Thus in 20 years, the tax free depreciation deductions alone would pay off each of said $4,000.00 loans on each house and lot* (Tr. 114-115).

About the middle of 1944, the partners discussed with the lending officer of Central Bank of Oakland, California, which bank the partnership was dealing with, the possibility of the partnership securing more loans under Title

VI of the National Housing Act. After their banker had reviewed their affairs he reported to the partners that the loan committee of the bank had observed that the partnership was already indebted for Title VI loans with respect to the said houses which the partnership was renting, in a sum in excess of $350,000.00, and he suggested to the partnership the advisability of their liquidating *some* of their rental properties in order to reduce their bank liabilities and as a means of providing themselves with additional working capital, suggesting in addition that they should take advantage of the then existing market for houses (Stipulation) (Tr. 153-154).

Petitioner McGah had his attention called to the stipulated facts in the preceding paragraph and was asked:

> "After that suggestion was made to you by the banker, Mr. McGah, *what did the partnership do* with respect to the advice so given?
>
> "A. Well, *as the houses became vacant*—in those days you didn't have to offer anything for sale. There was about 15 or 20 people available. The minute a van would move up, somebody would want the house, so *we disposed of them as they became vacant.*
>
> "Q. And you sold the 14 houses that were sold in the calendar year of the partnership that ended October 31, 1944, is that correct?
>
> * * *
>
> "A. Yes." (Tr. 116).

The petitioner O'Shea, asked the same question, answered (Tr. 127):

> "A. We sold 14 houses or *we disposed of such of those houses as they became vacant from time to time* * * *."

The record does not contain any direct evidence as to what the petitioners *intended* with reference to their purpose to hold houses for rental and investment when subjected to the pressure of the Bank's demand that they sell *some* of the rental houses other than evidence of what petitioners *did.* There is no direct evidence of any intent by them to abandon their purpose of holding the 95 units primarily for rental income and at most there is but an *inference* that they decided to sell some of their rental houses when houses became vacant.

The Bank's "advice" to sell was more than a suggestion. *It was more or less of a demand* (Testimony) (Tr. 127).

It will be noted that the 14 houses sold in 1944 by the partnership were sold *as they became vacant* (Supra).

No "for sale" signs were displayed on any of these 14 houses prior to sale and the homes were not advertised for sale (Testimony) (Tr. 121).

In 1944, during the period that the partnership was *renting* the 95 homes, *there was a very active market for homes. The partnership could have sold a hundred houses that year if it had tried. You could then sell 50 houses for every one you had* (Testimony) (Tr. 121-122). The market was "terrific" (Testimony) (Tr. 122).

During its fiscal year ended October 31, 1944, the partnership sold 14 of the 95 rented houses *as they became vacant* and *at the end of said fiscal year was still renting 81 thereof;* during its fiscal year ended October 31, 1945, said partnership sold 31 of said 81 houses and *at the end*

of said fiscal year was still renting 50 of said houses; during its fiscal year ended October 31, 1946, said partnership sold 13 of said 50 houses plus one additional home purchased and rented during the year and *at the end of said fiscal year was still renting 38 of said houses;* and during its fiscal year ended October 31, 1947, said partnership sold 3 of said 38 houses and *at the end of its fiscal years 1948 and 1949 held, and, at the time of the trial, still held and rented 35 of said original 95 houses* (Stipulation) (Tr. 150-151).

The first of these 14 houses sold in 1944 was sold on August 1, 1944, (EXHIBIT "4"—Schedule of GAINS ON SALES OF CAPITAL ASSETS) (Tr. 177).

Each of the 95 houses, sold as aforesaid, until it was sold, had been rented continuously by the partnership from on or about the time the construction of said house was completed (Stipulation) (Tr. 151).

The sale dates of the 14 houses sold in the fiscal year 1944 (See Tr. p. 177) are as follows: August 1, 1944; August 7, 1944; August 14, 1944; August 20, 1944; September 1, 1944; September 16, 1944; October 6, 1944; October 9, 1944; October 18, 1944.

Each of said 95 rented dwelling houses sold by said partnership, subsequent to April 1, 1943, was owned and held by said partnership for at least six (6) months prior to the sale thereof and prior to such sale and during the six months' period and at the time of its sale had been rented continuously by the partnership, as aforesaid (Stipulation) (Tr. 151).

The gain from the sale of the 14 houses sold in 1944 was reported as a long term capital gain pursuant to Internal Revenue Code Section 117 (j) (Tr. 175; Tr. 177).

We wish here to emphasize the *facts* (1) that the record is devoid of any *direct* testimony or proof of any intention on the part of petitioners to *abandon* their primary purpose of holding the 95 houses for rental and investment, the only proof being that *as houses became vacant,* they sold *some* of them; (2) that the rental venture continued *during the seven years,* 1943-1949, *both inclusive and was continuing at the time of trial with 35 of the original units* and (3) that it is a *stipulated fact* in this case that *each of the 95 houses sold, until it was sold, had been rented continuously from the time of its completion* (Tr. 151).

There was nothing in the priorities granted to the partnership for the 169 rental homes which prohibited their sale. EXHIBIT "2", which is the APPLICATION FOR PREFERENCE RATING, etc., par. 7 at page 4 (Stipulated) (Tr. 163) thereof under the caption GENERAL contains the following agreement:

> "* * *(b) I will not sell, nor will I lease or permit the sub-leasing of any dwelling unit *for more than the amount shown* in the Schedules under Item 4 or Item 5 above without the prior approval of the Director of Priorities, Office of Production Management, Washington, D. C. * * *"

This was an agreement relating to sale or rental *price,* but not a prohibition against sale.

The partnership could have sold all of the 169 houses had it wanted to (Testimony) (Tr. 125).

The partnership found out that it could sell all of the houses when it went back to the Federal Housing Authority after applying for the priorities. When they went back to get the substitution of $50.00 rental units for $39.99 units they found that it could sell all of the 169 units (Testimony) (Tr. 125).

Petitioners E. W. McGah and John P. O'Shea had, for a number of years, prior to 1944 been engaged in a number of business enterprises as shown by their income tax returns (Tr. 174-185), including the building, for sale of speculative homes (Stipulation) (Tr. 158).

During 1944, petitioners E. W. McGah and John P. O'Shea were also engaged in other businesses: Brennan, McGah & O'Shea, a joint venture which constructed and sold 121 homes (Tr. 160-164); Superior Tile Co., a copartnership in which they were equal partners, selling tile, linoleum, carpets and floor coverings of all kinds; Superior Tile and Linoleum Co. (Vallejo) a partnership engaged in the same business as Superior Tile Co.; Huston's Carpets and Linoleum (Oakland) a partnership selling appliances, furnishings, drapes, covers and general household covers; Towers & Marsh, a partnership, building homes (Testimony) (Tr. 119-120-121).

In its opinion, holding that the gain from the sale of these 14 rental houses sold in 1944 was taxable as ordinary income and was not taxable as a capital gain under Section 117 (j) of the Internal Revenue Code, the Tax

Court determined, contrary to the evidence, that "shortly before August 1, 1944, McGah and O'Shea decided that San Leandro Homes Co. should sell houses in order to get capital for further construction operations *and they 'abandoned' the purpose of holding the houses for the production of rental income*" and that "the business of San Leandro from before August 1, 1944 to the end of its fiscal year ended on October 31, 1944 was the sale of houses. At the time the houses were sold during the fiscal year ended on October 31, 1944, the houses were held primarily for sale to customers in the ordinary course of trade or business and they were *not* held primarily for investment purposes". (Tr. 72).

As a result of the foregoing, the Tax Court determined deficiencies for the year 1944 for the respective petitioners as follows:

E. W. McGah	$8,452.01
Lucille McGah	8,452.01
John P. O'Shea	2,337.30
Carole O'Shea	2,337.28

SUMMARY OF THE CRITICAL FACTS.

The following is a succinct summary of the *critical facts* set forth in the foregoing statement of facts that are determinative of the Tax Court's errors:

The *overwhelming proof* that the *95 houses in question were being used in the partnership's house rental business until the very moment of sale* and that the partnership *had never "abandoned"* its *purpose to hold the 95 houses primarily* for rental investment is that:

(a) The partnership was *formed* for the purpose of building 169 *rental* homes;

(b) An original associate, Goforth, withdrew from the venture *because* it was a *rental* deal;

(c) 74 houses were sold (including the 69 $39.99 rental units) *only* because they could not be rented at a profit, when it was found that the promised substitution of $50.00 rental units for the $39.99 rental units did not materialize;

(d) Despite the fact that the partnership *could* have sold the remaining 95 units, had they wanted to, they clung to their purpose and *rented* them;

(e) The sale of *rental* houses resulted from *pressure,* viz.—the bank's "suggestion" (virtually a demand) that they sell *some* (note that it was "some" and not "all") of the rental houses;

(f) The only evidence in the record of what the partnership *intended* as a result of what the bank "suggested" is what the partnership *did* and what they *did* in 1944 was to sell *some* (14) of the houses *as they became vacant;*

(g) The only correct inference of their *intention* is that they intended to sell *some* of the rental units as they become vacant;

(h) It is a *stipulated fact* that each house was *rented* from the time of its completion until the time it was sold, so that the *first* house sold had been rented continuously for over 17 months until it was sold;

(i) The purpose of the partnership to *adhere to its purpose of* holding the houses *primarily* for rental is proven conclusively by the *stipulated facts* that at the end of the six following fiscal years and even on

the date of trial they were *still holding substantial numbers of houses for rental.* Thus

End of fiscal year	Number of rental houses held
1944	81
1945	50
1946	38
1947	35
1948	35
1949	35
Date of trial	35

(j) The record shows conclusively and the Tax Court found that the market for houses during 1944 was *very active* and that they *could be sold without advertising* and the uncontradicted testimony is that the market was "*terrific*" and that *you could have sold 50 for every one you had;*

(k) In the face of this market the partnership continued for 17 months to *rent* houses when it could easily have sold them and then sold only 14 in 1944 when, had it desired, it could easily have sold *all*;

(l) The *stipulated facts* show that the *depreciation* on each house was $201.18 per year; that the partnership borrowed on 100% FHA loans $4,000.00 to cover the cost of each house and lot; that therefore, on 100% FHA loans with an investment of zero dollars the partnership in 20 years could have paid off each $4,000.00 loan (20 x $201.18 = $4,023.60) *out of tax free depreciation dollars alone.*

(m) The most that the evidence can be claimed to show is that the partners *intended to sell some* (not "all") *of the rental houses as they became vacant* and there is *no evidence* that they intended to "*abandon*" their *purpose* of holding the houses for rental investment.

These are the *proven facts* and when the Tax Court's findings and opinion are read against the background of the *facts* it will be seen that the Tax Court has substituted *conjecture* for *fact* and has *assumed* an intention to "*abandon*" the rental purpose when no such intention was proven and has indulged in an *inference* of "abandonment" contrary to law.

One needs only to read *seven recent Tax Court decisions,* and one Circuit Court decision, *each dealing with numerous sales of property used in trade or business where the gains were held to be subject to the limitations of IRC Sec. 117 (j)* to see the obvious error of the Tax Court's findings and decision.

The basic findings are *clearly erroneous* and the Court's conclusions are *contrary to law.*

SPECIFICATION OF ERRORS.

Petitioners specify the following errors:

I.

The Tax Court erred in finding that petitioners McGah and O'Shea "abandoned" the purpose of holding the houses primarily for the production of rental income.

II.

The Tax Court erred in finding that "the business of San Leandro from before August 1, 1944, to the end of its fiscal year was the sale of houses" and that "at the time the houses were sold during the fiscal year ended on October 1st, 1944, the houses were held

primarily for sale to customers in the ordinary course of trade or business and they were not held primarily for rental-investment purposes."

III.

The Tax Court erroneously construed Sec. 117 (j) of the Internal Revenue Code as meaning that there could be no *primary* purpose of holding property for rental investment purposes if there was a *secondary* purpose of selling the homes, if and when, at some future time, that might be advisable or desirable.

IV.

The Tax Court erroneously concluded that "The Central Bank was not disposed to carry San Leandro for any extended period of time, according to the record before us", whereas the Tax Court's very own finding that the Bank's requirement for faster liquidation related to additional borrowing, rather than to the borrowing related to the 95 rental homes which the Tax Court found were financed as 100% F.H.A. loans, none of which were shown to be in default.

V.

The Tax Court erroneously construes Section 117 (j) of the Internal Revenue Code, in its reference to the use of property in the trade or business of a taxpayer, as being inapplicable unless the taxpayer's purpose is to hold the property for trade or business or investment purposes *"for a long period of time."*

VI.

The Tax Court erroneously holds that where capital is required for a project there is a lack of a primary

purpose to invest capital and hold property to produce income for investment purposes where the taxpayer, either lacks substantial capital of his own or uses relatively small amounts of his own capital and borrows practically all of the capital for the purpose of its project, thus overlooking the fact, as it found in its findings of fact, that 100% F.H.A. insured loans were available for and used in this very rental project.

VII.

The Tax Court in its decision in the instant case has arrived at a conclusion with respect to the legal effect and meaning of Section 117 (j) of the Internal Revenue Code that is contrary to its determination as to its meaning and effect as determined by it in six (6) other recent decisions involving the application of Section 117 (j) to cases involving the sale of rental units.

VIII.

The Tax Court misapplied the provisions of Section 117 (j) of the Internal Revenue Code to the case at bar in that the Tax Court's very finding that taxpayers *"abandoned"* their primary purpose of holding the 95 houses primarily for the production in their rental business *proves the existence of their primary purpose to hold the 95 houses for investment and the production of rental income, as specified in Section 117 (j) IRC,* which is corroborated by the fact that the 95 houses *were used in the rental business until the very moment of their sale* and thus refused to apply Section 117 (j) to a case wherein the taxpayers sold real property held by them for over six months and held at the time of sale in their rental

business, primarily for the production of rental income and not held primarily for the sale to customers in the ordinary course of trade or business.

IX.

The Tax Court erred in failing and refusing to allow to be taxed under the provisions of Section 117 (j) IRC, the gain resulting from the sale by the taxpayers of real property, used by them in and held primarily by them for the production of income in their trade or business of renting dwelling houses, which houses they had owned and held for over six months at the time of sale and which houses were not held primarily for sale to customers in the ordinary course of trade or business.

In presenting the argument in support of the above specifications of error, the same, for convenience and brevity, will be presented under the headings that follow.

Unless otherwise indicated, all emphasis in this Brief is by counsel.

ARGUMENT.

I.

THE TAX COURT'S FINDING THAT THE PARTNERS "ABANDONED" THEIR PURPOSE OF HOLDING THE 95 HOUSES PRIMARILY FOR THE PURPOSE OF PRODUCING RENTAL INCOME IS CLEARLY ERRONEOUS FIRST, BECAUSE IT IS CONTRARY TO THE EVIDENCE AND SECOND, BECAUSE IT IS A FINDING MADE CONTRARY TO LAW.

The Tax Court has made the following finding of fact:

"Shortly before August 1, 1944, McGah and O'Shea *decided that San Leandro should sell houses* in order

to obtain capital for further construction operations and they *abandoned* the *purpose* of holding the houses primarily for the production of rental income. They decided to sell houses as tenants occupying them under oral month to month tenancies vacated them. The business of San Leandro from before August 1, 1944 to the end of its fiscal year was the sale of houses. At the time houses were sold during the fiscal year ended on October 31, 1944, the houses were held primarily for sale to customers in the ordinary course of trade or business and they were not held primarily for investment purposes'' (Tr. 72).

1. **The Tax Court has confused an inference of a decision by the partners to sell some of their rental units with an inference of an intention to abandon their purpose of holding the 95 homes for rental and investment purposes.**

We have shown that there is *no direct evidence* in the record of an *intention* on the part of the partners to *abandon* their purpose of holding the 95 homes primarily for rental income purposes.

The *stipulated facts* show the *pressure* exerted by the bank,—that they sell *some* (NOT ALL) of their rental units to provide themselves with more working capital and in order to take advantage of the existing market for the sale of homes (Tr. 153).

They were *not* required by the bank to sell *all* of the units and have *never sold all.* They still rent 35 of the units.

The record tells us what the partners *did* in response to the bank's pressure and from these facts, the Tax Court, in making its finding, *has drawn an inference.*

It is well established that an inference must be founded on fact and must be the probable and natural explanation of the fact. In 20 *Am. Jur.* p. 163, Sec. 159, it is said that "a fact can be regarded as the basis of an inference *only* where the inference is a *probable* or *natural* explanation of the fact. * * *"

The very finding by the Tax Court that just prior to August 1, 1944 the partners "*abandoned*" their primary rental purpose *necessarily admits* that until then the partners must have *had* that purpose. *They surely could not have "abandoned" a purpose which they did not have.*

The very most that can be inferred from the conduct of the partners is that in response to pressure from the bank, *they decided to sell some of their 95 rental units as they became vacant.*

What the Tax Court has done has been to *draw an erroneous inference from the facts.*

It has confused a *decision* by the partners to sell *some* of their rental units with a decision to *abandon* their purpose of holding the houses (i.e.—*the 95 rental units)* primarily for the production of rental income.

Not only did the Tax Court draw an *erroneous* inference but it also drew one that, *in law,* it was not justified in drawing.

No doubt but that the rental houses sold ceased, after their sale, to be used in the rental project. But there is no proof of an intent by the partners to *abandon* their primary *purpose* of holding the 95 houses for rental investment.

They simply sold some of the houses that they were holding for that purpose, but they did not abandon their purpose so that it can be said that the purpose *ceased to exist with respect to all 95 houses just prior to August 1, 1944.*

2. The Tax Court's finding that the partners "abandoned" their primary rental purpose is contrary to law.

"*Abandonment*" is no half-way or conditional thing. Thus, in 1 *Cal. Jur.* p. 8, Sec. 6, it is pointed out that there can be no such thing as a "conditional" abandonment. *"It must be all in all or not at all." Travaskis v. Peard,* 111 Cal. 599.

There is something *absolute, final* and *utterly irrevocable* about an abandonment. The New Century Dictionary says that "abandon" means to "yield or relinquish *utterly.*"

In *In Re Edwards,* 117 Cal. App. 667, at page 672, the Court says:

> "* * * The word *'abandon',* as defined by Webster, means 'To relinquish or give up with the intent of *never again* resuming or claiming one's rights or interests in; to give up *absolutely;* to forsake *entirely;* to renounce *utterly;* to relinquish *all connection* with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake' (Webster's New International Dictionary.) * * *"

Again, in 1 *C.J.S.,* page 3, the term "abandon" is thus defined:

> "To abdicate, desert, forsake, give up, resign, surrender or yield *entirely without intention to reclaim,*

> repossess or return; *totally* to withdraw from an object; to lay aside *all* care for it; to leave it *altogether* to itself; also to remove."

In Re Cordy, 169 Cal. 150, at 153 repeats Webster's definition of "abandon" which is found in *In Re Edwards*, supra.

The element of "*irrevocability* and *finality* in an abandonment is made clear in the decision in *Del Giorgio v. Powers,* 27 Cal. App. 2d 668 and 682 where the Court quotes from *Richardson v. McNulty,* 24 Cal. 339, 345, as follows:

> "* * * By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it or give it to another, or transfer it in any other mode authorized by law, (thereby preserving the continuity of possession), or he may *abandon* it. In doing the latter he must leave it *free to the occupation of the next comer*, whoever he may be, *without any intention to repossess or reclaim it* for himself in any event, and *regardless* and *indifferent* as to what may become of it in the future. * * *"

Everhart v. State Life Ins. Co (CCA 6) 154 F. 2d 347, 356, citing *State Mut. Life Ins. Co. v. Heine* (CCA 6) 142 F. (2d) 741, hold that the term "abandonment" means the *absolute* relinquishment or renunciation of a right.

Surely, it must be conceded that the record *lacks any affirmative proof of an intention to abandon their purpose* with respect to the 95 rented homes, in the light of the legal meaning of that term.

The law is well settled that proof of *abandonment* must be *clear, unequivocal* and *decisive.* In 1 *Am. Jur.* p. 12, Sec. 17, it is said that,

> "* * * The burden is on him who sets up abandonment to prove same by *clear, unequivocal and decisive* evidence. * * *"

To the same effect: *In re Stilwell,* 120 F. 2d 194; *Hoff v. Girdler Corp.* (Colo.) 88 P. 2d 100; *Perry v. Reynolds* (Ida.) 122 P. 2d, 508; *Witt v. Poole,* 188 S. E. 496; *Stephens v. Stephens* (Tenn.) 185 S.W. 2d 915; *Alberti v. Jubb,* 204 Cal. 325; *Latham v. Los Angeles,* 87 Cal. 514; *McDonald v. Bear River, etc. Min. Co.,* 13 Cal. 220; *Hewitt v. Story,* 64 Fed. 510.

It is quite evident that the requisite degree of proof of abandonment is absent. There is no clear, *unequivocal* or *decisive* proof of an intention to abandon *their primary purpose.*

3. The Tax Court's inference of abandonment was contrary to law because the facts proven did not reasonably require an exclusive inference of abandonment.

Where it is sought to sustain an *inference* of abandonment, from the *facts proven,* they must be facts *from which no other inference can reasonably arise.*

In 1 *C.J.S.* page 15, Sec. 7 (c) it is said:

> "Abandonment must be *clearly proved* by competent evidence either of affirmative and conclusive acts, or of facts FROM WHICH NO OTHER INFERENCE CAN REASONABLY ARISE than that of relinquishment with intention to abandon."

In *Foulke v. N. Y. Consol. R. Co.,* 228 N.Y. 269, 127 N.E. 237, 238, it is said on the subject of "abandonment" as related to packages left on a train:

> "The evidence did *not* permit the jury to find that the package was *abandoned*. The *abandonment* of property is the relinquishing of *all* title, possession or claim to or of it—*a virtual throwing away of it*. It is not presumed. Proof supporting it must be direct or affirmative, or REASONABLY BEGET THE EXCLUSIVE INFERENCE OF THE THROWING AWAY. * * *"

Again, in *Columbus & G. Ry. Co. v. Dunn*, (Miss.) 185 So. 583, 586, the Court quotes with approval the following statement in 1 *Am. Jur.* p. 8, Sec. 11:

> "* * * In determining claims of abandonment the courts have generally announced that each case must depend mainly on its own particular circumstances, *the evidence of which must be full and clear.* Proof of abandonment *must be direct or affirmative,* or must reasonably beget *the EXCLUSIVE INFERENCE of intentional relinquishment of the property right involved.*"

The evidence in this record does not beget the *exclusive inference* of an intent by the partners to abandon their purpose of holding the 95 homes for rental investment.

At *most*, the evidence supports only a decision by the partners to sell *some* of the homes that they held for the *primary* purpose of producing rental income.

This latter and correct *inference* is thus *another* inference that *could* and *should* be drawn from the facts. The inference drawn by the Tax Court was not an inference which was the *only* one that could be drawn from the facts proved.

4. The inference of abandonment of purpose is contrary to the facts proven.

As opposed to its wholly unjustified *inference* that the partners abandoned their *purpose* of holding the 95 houses primarily for rental and investment and were holding them primarily for sale to customers etc. we have the *stipulated facts* which are contrary to the inference.

It is *stipulated* (Tr. 151) that each of the 95 houses sold, *until it was sold, had been rented continuously by the partnership from the time its construction was completed.*

It is *stipulated* that the rental project was continuing at the end of each of the fiscal years 1944, 1945, 1946, 1947, 1948 and 1949 with the following number of the original 95 houses still being rented (Tr. 150-151):

Fiscal Year Ended	Number of Houses Still Rented
1944	81
1945	50
1946	38
1947	35
1948	35
1949	35

Yet, the Court found that the purpose of holding the houses primarily for rental was *abandoned* just before the first house was sold on August 1, 1944.

Bearing in mind that the evidence shows without contradiction that in 1944 (*when only 14 houses were sold*) the market for houses was "*terrific*", that you could sell 50 houses for every one you had (Tr. 121-122) that the Tax Court found (Tr. 70-71) that it was not necessary to advertise houses for sale, it is at once evident that had

the partners actually intended to *abandon* their rental *purpose,* they could have quickly and easily sold *all* the houses.

In the light of the undisputed evidence, the fact that they sold only 14, *as they became vacant* proves conclusively, we respectfully submit,

> *First,* that they resolved to *continue* with their rental-investment purpose with all the houses, making sales *only* of some of the houses, as houses became vacant; and
>
> *Second,* that they *did not* abandon their *purpose,* because if they *had* abandoned it, they could have sold *all* the houses very quickly and certainly would not have continued to this very day, still renting 35 of the houses.

The Tax Court found that following the Bank's "suggestion" (which was tantamount to a *demand*) that the partners sell "some" of the rental houses that (Tr. 70)

> "* * * McGah and O'Shea *then decided that San Leandro should sell houses.* * * *"

But it *did* not and *could* not find under the evidence that they decided to sell *all.*

But it does not follow that they decided to *abandon* their *purpose* of holding houses primarily for rental investment because, in bowing to the Bank's demand, they sold some of the houses as they became vacant.

Continuously holding houses for rental during the years 1944, 1945, 1946, 1947, 1948, 1949 and even on the day of trial, in the face of a market for houses which was "terrific",—where houses could be sold without advertis-

ing,—where you could "sell 50 houses for every one you had",—where it was more profitable to sell than to rent,—withholding sales until houses became vacant, etc.—are a compelling set of circumstances *absolutely inconsistent with the notion that just prior to August 1, 1944 the partners "abandoned"* their primary purpose of *holding the 95 houses for rental-investment.*

Quite naturally, *if they had abandoned* their purpose, one would have expected a prompt sale in order to take advantage of the market, instead of 14 sales in 1944, 30 in 1945, 12 in 1946, 3 in 1947 and none in 1948 or 1949.

The fact that they held on to them with the partnership renting 81 at the end of its 1944 fiscal year, 50 at the end of its 1945 fiscal year, 38 at the end of its 1946 fiscal year and 35 at the end of its 1947, 1948 and 1949 fiscal years and at the time of trial, and that every house sold was rented from the date of its completion, about March 15, 1943, until the very moment of sale—a *minimum* period of 17 months, most *strongly and emphatically corroborates the continuing purpose to hold them for rental-investment until they became vacant.*

II.

THE TAX COURT RESORTED TO IMPROPER LEGAL CRITERIA IN CONCLUDING THAT THE PARTNERS ABANDONED THEIR RENTAL PURPOSE AND THAT FROM AUGUST 1, 1944 TO THE END OF THE FISCAL YEAR ON OCTOBER 31, 1944, THE PARTNERS WERE HOLDING THE HOUSES PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF THEIR BUSINESS.

1. **It is thoroughly well established as a matter of law that it is immaterial, so far as the application of Section 117 (j) is concerned that the partners were also engaged in selling houses.**

In its opinion (Tr. 82) the Tax Court says:

> "* * * It appears in these proceedings that the business of San Leandro was building houses, that *sales* thereof were *part* of that business and that it was *only by selling houses that San Leandro could turn over its capital* and build more houses. * * *"

This statement overlooks a principle now well settled as a matter of tax law: The fact that a taxpayer may be in the business of *selling* property and *also* in the business of *renting* the same kind of property does not prevent him from taking advantage of IRC Sec. 117 (j) when he sells his *rental* properties:

(a) *Elgin Bldg. Corp.*, 8 T.C.M. 114, (Feb. 15, 1949) where the taxpayers sold both *rental* and *non-rental* units. They were held entitled to capital gain limitations on the sale of the *rental* units, but not on the sale of the *non-rental* units. With respect to the latter, the Court said (p. 123):

> "* * * With respect, however, to the properties that were *sold without ever having been rented* and mostly within brief periods after completion, *we conclude*

> *that they were held,* and, in fact produced, *primarily* for sale and that the gain on their disposition was ordinary income. Their number, frequency and regularity require that conclusion. *Spanish Trail Land Co.,* 10 T.C. 430. * * *"

In our instant case, the taxpayers sold 74 units which they never rented and held and rented 95 units.

(b) Again in *Julia K. Robertson,* 8 T.C.M. 870 (Sept. 29, 1949) where the taxpayer was afforded relief under Sec. 117 (j) with respect to the sale of his *rental* units, the Commissioner argued that the taxpayer derived a larger percentage of profits from sales than from rentals, that petitioner was *involuntarily* in the rental business, that his subsequent resumption of building for sale indicates that in the taxable years he was holding the property for sale. With all this the Tax Court disagreed, holding that it was *immaterial* whether taxpayer was in the rental business from *necessity* or *choice*:

> "* * * Many individuals in the war years changed the kind of business in which they were engaged. *In some instances the ratio of profits was larger and in others smaller, but as patriotic citizens they cooperated regardless of results.* A vast majority of them, when the war ended, resumed the same business in which they had theretofore been engaged, as did petitioner."

Here again, *despite his sales business,* the taxpayer enjoyed the benefit of Sec. 117 (j), on the sale of *rental* units.

(c) *Claude M. Ferguson* (decided March 21, 1950) 9 T.C.M. 243, where the taxpayer sold both *rental* and *non-*

rental property and was allowed the benefit of Sec. 117 (j) on the sale of the *rental* units.

(d) *Nelson A. Farry* (decided July 6, 1949) 13 T.C. 8, where the taxpayer sold both *rental and non-rental* units and had relief under Sec. 117 (j) with respect to the sale of *rental* units.

(e) *A. Benetti Novelty Co.,* (decided December 22, 1949) 13 T.C. 1072 where the taxpayer was in the business of selling *non*-rental units as well as in the *rental* business and had relief with respect to the gain on the sale of *rental* units under Sec. 117 (j) after having decided to sell all of the older units and to retain only the newer units in its rental business.

(f) Note that in *E. Everett Van Tuyl,* 12 T.C. 900, 905, it is said that,

> "It is established that a taxpayer may be a *dealer* as to *some* securities and *he may also hold similar* or other *securities on his own account for purposes other than for resale to customers.* As to the latter, he is not a dealer, he is not entitled to compute income on the inventory method and securities so purchased are properly recognizable as capital assets within the meaning of Sec. 117 (a) (1)" (Citing cases).

(g) See *Mary A. Browning et al.,* decided by the Tax Court November 27, 1950, 9 T.C.M. 1061. The Tax Court said the 56 items sold during the taxable years 1944 and 1945 had been rented a total of 218 times. (In our instant case, the 95 houses were rented to 156 tenants before the first house was sold.) The Tax Court then said:

"The fact that these 56 pieces of equipment were eventually sold after much service does not militate against our conclusion that they were held *primarily* for *rental* purposes. *Nor does the fact that the partnership was also in the business of selling such equipment and that its gross sales exceeded its rental income during the years here involved.* As said in *Nelson A. Farry,* 13 T.C. 8, 'A DEALER CAN ALSO BE AN INVESTOR'. See also, *A. Benetti Novelty Co. Inc.,* 13 T.C. 1072; *Carl Marks & Co.,* 12 T.C. 1196; *E. Everett Van Tuyl,* 12 T.C. 900."

(h) *Delsing v. U.S.* (CC 5) (not yet officially reported) decided January 5, 1951. There the taxpayer for several years prior to World War II had been engaged in a substantial business of building houses for *sale.* He built 45 defense rental units in 1942 under government priorities and *rented* them to war workers *on a month to month basis,* exactly as the partners in our present case rented their homes. He maintained a separate rental office to manage the rental project, as did the partners in the instant case. He was *also* engaged in *selling* houses and as in our present case, no "for sale" signs or advertisements were used in selling the rental units. The Circuit Court held, *as clearly erroneous* the Trial Court's finding

"that these properties were originally constructed for sale, or, rental, and, that that course of sale was in the regular course of business when they were sold."

The Court also points out another fact (parallel to a fact in this case):

"By agency regulation, on and after August, 1943, taxpayer *could have sold* 1/3 of the entire rental pro-

ject, *but he at no time made any effort to secure approval or to sell* any of the units until solicited by returning service men in 1945 * * *''.

The Tax Court's statement, we submit, was clearly erroneous. *It is immaterial that the partnership was also in the house selling business.*

This did not prevent it from having relief under I.R.C. Sec. 117 (j).

One of the cases relied upon by the Tax Court in *Farry,* supra, was *Van Tuyl,* supra.

The Respondent has *now acquiesced in both of these cases, Farry,* 1950—1 C.B. 2 and *Van Tuyl,* 1949—2 C.B. 3.

Note also, in *A. Benetti Novelty Co.,* 13 T.C. 1072 at page 1078, referring to the sale of slot machines used in the regular rental operations of the taxpayer, the Tax Court said at page 1078:

> ''It seems that the gains in issue were derived from sales of machines which were originally purchased and held for rental purposes only. As indicated in the *Farry* case, supra, *the purpose for which the* property is held is the controlling factor. And *since here the machines at the time of sale were held primarily for rental, the receipts in question are taxable in accordance with Section 117,* as petitioner contends. See also *Carl Marks & Co.,* 12 T.C. 1196 and *E. Everett Van Tuyl,* 12 T.C. 900''.

It is evident that the *primary purpose* of the petitioners was to hold these 95 houses *primarily* for the purpose of producing rental income.

The fact that they may have had a *secondary* purpose of sale is immaterial. In *John Graf Co.,* 39 B.T.A. 379, the Board of Tax Appeals was dealing with Section 117 (b) of the Internal Revenue Code which contained the two exclusionary clauses now found in Section 117 (j). In that case the taxpayer manufactured and sold soda water and also sold beer. It also rented out electric water coolers under lease for a term of months and gave the renter an option to buy, in which event the renter was given credit for some portion of the rent already received, on account of the purchase price. The Board held that the coolers sold pursuant to the exercise of the options were not held *primarily* for sale to customers in the ordinary course of its business. At page 386 of its opinion, the Board said:

> "* * * These water coolers, however, were put out by the petitioner in order to sell spring water under a written contract, which very plainly, we think, provides *primarily* (emphasis by the Board) that the contract is one of leasing and not of sale and *that the sale is secondary"* (emphasis by counsel).

Thus, we say, that it is possible to harbor a secondary purpose of sale without interfering with a primary purpose to produce income for rental investment.

2. The requirement of Section 117 (j) is that the property sold has been used in the taxpayers' trade or business.

This is also made very clear by the Circuit Court's decision in *Albright v. U.S.,* (CC 8) 173 F. 2d 339, 344, where the Court said:

> *"Section 117 (j) was intended as a relief measure applicable alike to all taxpayers within its provisions. Leland Hazard v. Commissioner,* 7 T.C. 372. That it

> was so intended is clearly expressed in the report of the Committees of the House of Representatives and of the Senate in charge of the bill. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 53-54 (1942-2-Cum. Bull. 372, 415), and S. Rep. No. 1631, 77th Cong., 2d Sess., p. 50 (1942-2 Cum. Bull. 504-545). The section provides an entirely new method of reporting gains and losses on the sale of *non-capital* assets used in the trade or business of the taxpayer. The amendment permits the taxpayer to deduct in full the net loss resulting from transactions within the purview of the section and to report the net gain only to the extent of 50 per cent. *Nothing in the language of the Act indicates an intention on the part of Congress to deny the relief granted by the section to any taxpayer whose transactions meet the prescribed conditions.* * * *"

This case, which relates to the sale of breeder animals, held that the animals in question had been used in the taxpayers' trade or business before their sale and *that this was the only requirement imposed by the statute.*

The Tax Court has agreed with and followed the *Albright* decision in the following cases: *Isaac Emerson,* 12 T.C. 875; *Leslie S. Oberg,* 8 T.C.M. 544, Dec. 17016(M); *Flato,* 14 T.C. 1241, 1250 and *Fields,* 14 T.C. 1202, 1215.

It is significant to note that in *Isaac Emerson,* 12 T.C. 875, at 879, the Tax Court in its opinion also said, referring to the *Albright* case:

> "We also agree with that part of the Court's decision wherein it was held that the fact that the hogs from the breeding herd *were customarily conditioned for market before sale does not show that the tax-*

payer has not held them for the purpose of breeding or that they were held primarily for sale to customers in the ordinary course of his trade or business."

Sec. 117 (j) being a relief section naturally cannot be defeated by imposing any requirements not spelled out by Congress, as is so clearly pointed out in the *Albright* case, supra.

Particular attention is directed to the Tax Court's decision on October 20, 1950 in *Alamo Broadcasting Company, Inc.,* 15 T.C. 534 where, at page 541, the Tax Court significantly says:

> "The nature of petitioner's loss is governed by our determination that petitioner purchased the diesel with the intent of using it in its new facility. The loss properly falls within the provisions of section 117 (j) as a loss incurred on the sale of property 'used in the trade or business'. We have previously held that 'used in the trade or business' means *'devoted to the trade or business'* and includes property purchased with a view to its future use in the business EVEN THOUGH THIS PURPOSE IS LATER THWARTED BY CIRCUMSTANCES BEYOND THE TAXPAYER'S CONTROL. *Carter-Colton Cigar Co.,* 9 T.C. 219. See also *Wilson Line, Inc.,* 8 T.C. 394; *Kittredge v. Commissioner,* 88 Fed. (2d) 632; *Yellow Cab Co. of Pittsburgh v. Driscoll,* 24 F. Supp. 993; *Independent Brick Co.,* 11 B.T.A. 862."

Here the purpose of the taxpayer was thwarted in part by the bank's requirement that they sell some of their rental houses but this still does not deprive them of the benefits of Section 117 (j).

3. A long series of recent Tax Court decisions hold that the number and frequency of sales of property used in the taxpayers' rental business does not cause that property to become property held primarily for sale to customers in the ordinary course of business.

The effect of the Tax Court's decision in the case at bar is that the number and frequency of the sale of rental units causes that property to become property held primarily for sale to customers in the ordinary course of trade or business and thus brings the property outside the scope of Sec. 117 (j).

This is directly contrary to the decisions involving the sale of rental units, real and personal, hereinafter referred to.

The Tax Court's Opinion (Tr. 77) referring to alleged tests which it says are applied to determine whether property is held primarily for sales to customers in the ordinary course of business and says:

> "* * * One test of whether property is held primarily for investment purposes is lack of continuity of sales, either because of inactivity or infrequency of sales, so that sales which take place have the aspect of isolated transactions. *The test, applied to the facts of these proceedings, fails according to our* understanding of the evidence in these proceedings".

Note also that the Court found (Tr. 73):

> "The sales of the houses in 1944 were continuous and frequent during the three-month period of the sales."

This whole concept of the Tax Court is clearly erroneous in fact and equally contrary to law.

The Respondent in case after case, has *unsuccessfully* contended that sellers of rental properties were not holding their rental property which they sold primarily for rental purposes, but primarily for sale to customers in the ordinary course of business.

But time and time and again, with appalling regularity, in cases similar to this, the Respondent *has been held to be wrong in his position.*

THE NUMBER AND FREQUENCY OF SALES OF RENTAL UNITS HAS NOT PUT THE TAXPAYER IN THE HOUSE SELLING BUSINESS OR CONVERTED THE RENTAL UNITS INTO PROPERTY HELD PRIMARILY FOR THE SALE TO CUSTOMERS IN THE ORDINARY COURSE OF TRADE OR BUSINESS SO AS TO PREVENT HIM FROM HAVING THE BENEFIT OF SEC. 117 (j).

Furthermore, in each of the following cases, the taxpayers *must necessarily have decided to sell their rental units.*

But note that the decision *to sell rental units did not constitute any alleged "abandonment" of the primary purpose to hold for rental and investment* or cause the property to be classed as held primarily for sale to customers.

(a) In *Elgin Bldg. Corporation* (decided February 15, 1949) 8 T.C.M. 114, the number of *rented* units sold was

1944	Elgin	6 units
	Waco	20 units
1945	Elgin	18 units
	An-Lo	3 units
	Waco	26 units

This certainly involved both the element of "frequency" and "continuity" of sales. Under the petitioner's commitments, if a house was once rented, it could not be sold unless the tenant exercised his option to purchase or an outsider bought subject to the tenant's rights. The Tax Court said, page 123:

> "* * * As to all of these properties, we agree that *this circumstance* stamped their primary purpose as rental or income producing housing; and that they were capital assets under Sec. 117 (j). * * *"

This was a case in which the petitioners were *required* to rent the houses. In our instant case the petitioners *voluntarily* held the houses, had a full right to sell the same, the market was active, there was a strong demand for houses, and the possibility of profits high. Surely their situation was no different from the situation of the petitioners in Elgin. And again note that in Elgin the petitioners must have *decided to sell these rental units* and their decision to sell was *not* held to constitute an abandonment of the rental-investment purpose so as to deprive them of relief under Section 117 (j).

The number and frequency of sales of RENTAL units did not deprive the taxpayers of the benefits of Sec. 117 (j) I.R.C.

(b) In *Nelson A. Farry,* 13 T.C. 8, 11 (decided July 6, 1949) the taxpayer did exactly what the taxpayers here did, namely *sold rental units ON THE ADVICE AND COUNSEL OF THEIR BANK.* He sold *19* units in 1944 and *27* units in 1945 *(Observe the number of sales).*

> "By mid 1943 the housing situation especially rental, in Dallas changed materially. The removal of

the 8th Service Army Command from San Antonio to Dallas, which began in late 1942 was accomplished, bringing in thousands of service personnel. Other war agencies and plants were in operation. The heaviest influx of new Dallas residents had absorbed rental vacancies and people were seeking almost any place to live; if not to rent, then to buy, the scramble to rent or to buy housing, not investment property was well under way in late 1943, it was yet to become more acute in 1944 and 1945, when housing demands forced prices to new peaks. *Under these conditions and in view of rent control, when petitioner counselled with his banker, the advisability of liquidating some of his rental properties was suggested.* It was pointed out to petitioner by his banker that interest on the notes which he could take in the sale of these rental properties would yield more than rent from the property. *PETITIONER CONCURRED IN THIS VIEW.*"

Note that "*Petitioner concurred in this view*". There can be no doubt but that the petitioner *MADE A DECISION* to sell SOME of his rental property, which was exactly what was done by the petitioners in the instant case. At page 13, in the course of its opinion, the Court in the *Farry* case says:

"* * * However, it seems to us that the petitioner has proved by overwhelming evidence that he purchased and held these rental properties primarily for investment purposes. *The fact that in the taxable years he received satisfactory offers for some of them and sold them does not establish that he was holding them 'primarily for sale to customers in the ordinary course of his business'.* The evidence shows that he was holding them for investment purposes and not for sale as a dealer in real estate."

(c) *Julia Robertson,* 8 T.C.M. 870 (decided September 29, 1949). In 1944 the taxpayer sold 4 rental units and in 1945 5 were traded and 10 were sold. *(Thus, in 1945, 15 units were disposed of; in our instant case 14 rental units were sold in 1944.)* Referring to the houses having been built for rental, the Court said (p. 872):

> "* * * Furthermore, petitioner's testimony (i.e. that the houses were acquired for rental) that such was his purpose in acquiring the properties is *corroborated by the use to which the properties were devoted in the taxable years. In those years they were devoted primarily to rental and not to sales.* * * *"

(In our instant case, the 95 units were built for rental and were rented continuously for 17 months to 156 tenants before a single sale was made.)

(d) *A. Benetti Novelty Co.,* (decided December 22, 1949) 13 T.C. 1072. The petitioner's principal source of income was from the *rental* of slot machines, coin operated phonographs, etc. During the war the Armed Services desired to purchase machines for canteens, officers' clubs, etc. *Some machines were purchasd for resale.* The principal question was as to the sale of the machines from the taxpayer's *rental* business. The Court said (p. 1074):

> "During the taxable year petitioners *DEEMED IT ADVANTAGEOUS* to retain and use in its business the newest and most attractive machines so purchased and *TO SELL* TO SERVICE CLUBS THE OLDEST MACHINES *USED BY IT IN ITS REGULAR OPERATIONS.* Machines used in petitioner's operations were regularly moved from the place of business where located to petitioner's service shop where they were serviced, repaired and if necessary rehabilitated. * * *"

What we ask to be noted is that the Court in its opinion declares that the petitioner *DEEMED IT ADVANTAGEOUS* TO SELL TO SERVICE CLUBS THE OLDEST MACHINES PREVIOUSLY USED BY IT IN ITS REGULAR OPERATIONS. Therefore, the Petitioner must have made a DETERMINATION OR DECISION to sell old machines used in its regular rental business. The significant thing to note is that the fact that that decision made by the taxpayer which is little different from the decision made in this case, *did not amount to an "abandonment" of the purpose of holding machines primarily for the produtcion of rental income. And, this did not prevent the operation of Sec. 117 (j).* At page 1078, the Tax Court says:

> "It will be noted in the findings of fact here that the major portion of the profits involved was derived from the sale of machines *held for rental purposes several years prior to sale.* During 1942, 1943 and 1944 it purchased more machines than ordinarily and it is stipulated that during the taxable years involved petitioner '*deemed it advantageous* to retain and use in its business the newest and most attractive machines so purchased * * * and *to sell to service clubs the oldest machines PREVIOUSLY used* * * * in its regular operations'. ITS 'REGULAR OPERATIONS', of course, CONSISTED OF RENTING THOSE MACHINES. It thus seems that the gains in issue were delivered from sales of machines *that were originally purchased and held for rental purposes only.* As indicated in the *Farry* case, supra, (13 T.C. 8) the purpose for which the property is held *is the controlling factor,* and, since here the machines *at the time of sale* were held primarily for rental, the receipts in question are taxable in accordance with Section 117 as petitioner contends. * * *"

The machines sold were thus ones *previously* used in the rental business. It appears that *93 units were sold in 1943, 135 in 1944 and 27 in 1945* (Opinion, p. 1075-6) *but this number and frequency of sales did not mean that the seller was holding the machines it decided to sell, primarily for sale* so as to deprive it of the benefit of Sec. 117 (j).

(e) *Claude M. Ferguson,* (March 21, 1950) 9 T.C.M. 243. This is a very significant decision. Here the taxpayer sold *rental* properties and the *Commissioner contended that the number and frequency of sales put the taxpayer in the business of selling homes.* The Court in its opinion refers to the *Farley* case, 7 T.C. 198:

> "* * * During the taxable year the taxpayer sold some lots. He made no efforts to sell, but accepted such offers as were made. He did not advertise the property for sale, hired no agents, erected no signs, did not list the property, or construct any improvements to facilitate its sale for residential purposes. Noting that the frequent and continuous character of the sales resulted *notwithstanding the taxpayer's passivity rather than from any business activity on* his part, *we refused to apply the 'frequency and continuity' test, and held that the property of the taxpayer was not held primarily for sale to customers* in the ordinary course of his trade or business and that the profit derived from the sales in question was taxable as a long-term capital gain and not as ordinary income."

Now observe the Court's decision:

> "* * * We are convinced from the evidence that he purchased such property from 1936 to and including

> the taxable years as an investment so that he might derive profit from rentals. *It was not purchased or held primarily for sale,* and such sales as were made during the taxable years of this residential property resulted from unsolicited offers to purchase made by tenants and others or *from pressure put on petitioner during the years 1945 or 1946 by banks,* who had loaned him money to finance purchases, to have him repay a substantial portion of the money loaned. *Sales made under such circumstances do not establish that petitioner was holding this residential property 'primarily for sale to customers in the ordinary course of his trade or business.'* We have made a finding that this residential property was not so held, and it follows that any gains realized by petitioner from the sale of the properties listed in our findings which were held for more than six months are taxable as capital gain and not as ordinary income. Any gain realized from residential property sold which was not held for more than six months is taxable as ordinary income. See *Nelson A. Farry,* 13 T.C. 8 (Dec. 17,079)."

But, *the number and frequency of sales again did not prevent the operation of Sec. 117 (j).*

And note also what the Court said about sales resulting *from the pressure put upon the taxpayer by banks.*

(f) *Roy L. Self,* (May 26, 1950) 9 T.C.M. 421. Here all of the houses were rented to tenants from the time of completion until the time of sale. *Thirteen (13) such rental houses (1 unit less than the number sold by petitioners herein in 1944) were sold.* There was a very active demand for houses when these houses were completed,—"*a seller's market*" prevailed and *all of the houses could*

have been sold on completion, just as McGah & O'Shea could have sold their 95 rental houses on completion. The taxpayer, Self, must necessarily have *decided* to sell his 13 houses, but neither that fact, nor the fact that *13* houses were sold, was held, as a matter of law, to constitute an "abandonment" of the purpose to hold primarily for rental as to deprive him of the benefits of Sec. 117 (j) I.R.C.

(g) *Mary Alice Browning,* 9 T.C.M. 1061, a memorandum decision of the Tax Court, decided November 27, 1950. This case involved the sale of rented equipment. During the two fiscal years involved (1944 and 1945), the taxpayer sold *24 and 32 pieces of rental equipment.* (*Note the number of sales,—56 items* sold.) There, as here, the Respondent contended that such sales were of property held primarily for sale to customers in the ordinary course of business. *The Tax Court held for the taxpayer and allowed the benefit of Sec. 117 (j).*

(h) *Delsing v. U. S.* (C.C. 5) January 5, 1951 (official citation not yet available), reversing the United States District Court for the Northern District of Texas, cited by the Tax Court in its opinion (Tr. 80). Here, under priorities, the taxpayers constructed 45 defense rental units which were rented to war workers *on a monthly basis,* exactly as these petitioners rented their houses. The taxpayer Delsing made his *first sale in August, 1945 and sold the remainder in October and December, 1945.* (Observe that 12½ duplex units were sold within three months.) *The Court said that the disparity between income from sales and income from rentals was not controlling* and held

> "We find *no permissible basis* for a determination that the sales of the *originally constructed defense rental housing* units constituted a disposition of 'property held by the taxpayer primarily for sale to customers in the ordinary course of trade or business' so as to render the profits taxable as ordinary income."

The Court further held that it was immaterial that for several years prior to the war the taxpayer had been engaged in a substantial business of constructing homes for sale.

This long line of cases, recently decided, establish clearly, we think, that the criteria used by the Tax Court in our instant case are contrary to Sec. 117 (j) as that section has been thus construed.

The number and frequency of sale of rental units does not deprive the taxpayer of the benefit of Sec. 117 (j) nor does his decision to sell some or all of his rental units constitute any abandonment of his former rental purpose nor cause the property to be classified as property held primarily for sale to customers in the ordinary course of trade or business.

In its opinion (Tr. 80) the Tax Court says that it thinks that the reasonable inference to be drawn from the evidence is that the partnership was in the business of selling houses in 1944 within the meaning of I.R.C. Sections 117 (a) and (j) citing, *inter alia, Delsing v. U. S.* (D.C. No. Dist. Texas), *Ehrman v. Comm.* (CC 9) 120 Fed. 607 and *McFadden,* 2 T.C. 395.

The District Court's decision in *Delsing v. U. S.* has been reversed by the Circuit Court.

In the *Ehrman* case, supra, this Court held that the facts necessary to create a trade or business within the meaning of the Revenue Act "*revolve largely around the frequency or continuity of the transactions* claimed to result in the 'business status'."

Well and good. Consider the *stipulated facts* in this case (Tr. 150) that "*from March 15, 1943 until August 14, 1944, said 95 houses were rented to 156 different tenants*". IN OTHER WORDS, IN NEARLY 17 MONTHS THERE WERE 156 RENTAL TRANSACTIONS INVOLVING 95 PIECES OF PROPERTY.

If *frequency and continuity* determine business status, it is respectfully submitted that the 156 rental transactions involving 95 rental units *clearly demonstrates that the partnership was in the HOUSE RENTAL business.*

The same is true with respect to the tests shown in *McFadden,* 2 T.C. 395, 405.

The other cases referred to in the Tax Court's Opinion (Tr. 80) are not reported in Federal Supplement and since we do not have access to them, we cannot comment thereon.

Carl Marks & Co., 12 T.C. 1196, is the converse of our case. There petitioner, a dealer in foreign securities, *transferred* all of its domestic securities and certain of its foreign securities out of its *inventory* into an *investment* account on December 29, 1941. It was held that as a result of the *transfer,* the securities took on the character of *capital assets* and hence their status as such at the time of sale determined the taxability of the gain as a long term capital gain. The Court said (p. 1202):

> "* * * Certainly it cannot be argued that securities one acquired for resale to customers must forever retain their dealer status, when in fact there has been a *conversion* of those securities from a *dealer* to an *investment* account. *E. Everett Van Tuyl,* 12 T.C. 900. The crucial factor to consider in determining the character of the securities involved is the *purpose* for which they were held during the period in question and in this case we believe the facts show that those securities were held for investment purposes after December 31, 1941."

Be it noted, however, that in that case, there was a *conversion, a voluntary and express change of purpose* (p. 1202):

> "* * * Petitioner took detailed and extensive steps, as shown in our findings, to segregate the handling of those securities *transferred* to the investment account, both *physically* and on its books of account. * * *"

BUT IN OUR PRESENT CASE THERE IS NO EVIDENCE OF ANY SUCH EXPRESS *CHANGE OF PURPOSE,* OR OF *ABANDONMENT* OF PURPOSE, TO HOLD PRIMARILY FOR THE PRODUCTION OF RENTAL INCOME. The evidence shows only that their banker requested or demanded that they sell *some (NOT ALL)* of their rental units. The evidence shows only what they *did;* they sold units *as they became vacant* which is but another way of saying that THEY WERE USED IN THE RENTAL BUSINESS *(which continues until today with 35 units)* UNTIL THE MOMENT OF SALE. There never was a "*conversion*" as in *Carl Marks & Co.*

When one stops to consider Sec. 117 (j) in relation to the *sale* of real property used in the trade or business and held primarily for the production of rental income and not held primarily for sale, it is quite obvious that the Section would be *meaningless,* if construed to mean that the decision of an owner to sell, and his sale, of such property would take the owner out of the rental business and put him in the house selling business and automatically classify the property used in the rental business as property held primarily for sale to customers in the ordinary course of trade or business and thus preclude relief under the section.

4. **The Tax Court erroneously construed Section 117 (j) by its holding that unless the taxpayer has a fixed purpose of staying in the rental business for a "long period of time" he cannot be deemed to be in that business so as to enjoy the benefit of the section when he sells his rental units.**

In its opinion the Tax Court says (Tr. 78) that:

> "* * * And the partners, themselves, had *no fixed purpose in 1944 of renting the properties for a long period of time,* or of holding them for investment purposes, according to the testimony of one of the partners. *How long they would 'be in the business' was a matter of conjecture to them.*"

Here we think the Tax Court has utterly misconstrued the meaning and effect of I.R.C. 117 (j).

But before we examine the law, let us first look at the proof in the record which shows that the *actual intention* of the partners, as shown by their testimony, was quite different from what the Tax Court's Opinion says was their intention.

The opinion also states (Tr. 76) that "O'Shea testified that he and his partner did not know, at the time they applied for priorities ratings, in 1942, how long San Leandro would be in '*the business*' and that it was impossible to guess * * *."

What Mr. O'Shea *actually said* was (Tr. 129):

> "At the time we decided to embark on that *rental* project, Mr. Nyquist, it would appear that we wouldn't know how long we would be in *the business;* because, why *we would have to rent them for the duration of the war.* We didn't know the length of time we would be in *the business.* It was impossible to guess at that particular time."

Also note Mr. O'Shea's statement (Tr. 131):

> "We expected to *rent* them for an indefinite period."

We think that a fair consideration of the *facts* requires the conclusion that "*the business*" referred to by the witness was the *rental business* which it was contemplated would run "*for the duration of the war,*"—how long *that* would be, naturally the witness couldn't guess.

We think that the Tax Court's statement thus goes far beyond the proof in the record.

If, as in our present case, parties *are actually in the house rental business* (as these partners were for over 17 months before they sold the first house at the bank's suggestion), it is wholly immaterial that they harbored the *secondary* thought that *ultimately* they would or *might* sell the rental uses.

The statute (Sec. 117 (j) (2)) declares that if during the taxable year the gains upon sales "*of property used in the*

trade or business" for over 6 months exceed the losses from the sale of such business, the gains shall be considered gains from the sale of *capital assets* held for more than 6 months.

Despite the favorable opportunity to sell, the petitioners *rented the 95 units continuously for 17 months before a single sale was made and then sold under pressure,—only because their banker demanded it.* WHAT THEY DID IS THE STRONGEST POSSIBLE CORROBORATION OF THE FACT THAT THEY MAINTAINED THEIR ORIGINAL PURPOSE TO HOLD THE 95 HOUSES PRIMARILY FOR THE PRODUCTION OF RENTAL INCOME.

There could have been no clearer proof than this of their intention to carry on *the house rental business. Hazard,* 7 T.C. 372, 375; *Noble,* 7 T.C. 960, 964; *Fackler,* 45 B.T.A. 708, affd. 133 F. (2d) 509; *Jephson,* 37 B.T.A. 1117; *Campbell,* 5 T.C. 272; *Kimbell,* 41 B.T.A. 940; *Vosburgh,* 23 B.T.A. 780.

This is *not* a case where property was acquired and held primarily for sale and was rented only while awaiting sale as in *Schultz,* 44 B.T.A. 146, *Black,* 45 B.T.A. 204 and *Morely,* 8 T.C. 904, cited by the Court.

The fact that the taxpayer engaged in good faith, as these partners were, in the house rental business harbor an *ultimate* or *secondary* purpose of selling the houses one day, does not deprive them of the benefits of Sec. 117 (j).

The very use of the word "*primarily*" in the statute connotes the possibility of there being a *secondary* pur-

pose and it is the *primary* and *not* the *secondary* purpose that controls.

The correctness of this view will also appear in the next subdivision of this Brief.

5. **The Tax Court erroneously holds that the primary purpose to hold the houses for the production of rental income is negatived by the fact that the partners lacked substantial capital of their own and borrowed substantially all of the capital required for the venture.**

In its opinion (Tr. 77) the Tax Court says:

> "* * * The petitioners assert that San Leandro, in the taxable year, was engaged in an investment operation. But the record shows that San Leandro lacked any substantial capital of its own *and it is a fact that it had borrowed practically all of the capital required to purchase the lots and build the houses.* The evidence shows, also, that the annual net income from rental receipts was small in view of San Leandro's indebtedness to the Bank. *The situation was such as we construe the evidence in the record before us, that realization of any substantial gain depended upon making sales of the houses.* * * *"

This construction of the evidence and concept of the law is both *clearly erroneous* and *completely unrealistic.*

It is clear from the record that 100% F.H.A. 20-year loans *were* available; that the partnership had priorities to build 169 *rental* homes; that they were granted 100% F.H.A. loans to build such *rental* homes.

Yet the Tax Court's opinion (Tr. 75) further says:

> "* * * An *obvious question* is how San Leandro expected to pay the loans obtained to build the houses

and how long it would take to work out the project from the viewpoint of the financing which was adopted. *San Leandro was created with a very small amount of working capital.* * * *"

It can truthfully be said that the *answer* is obvious, but that the *question* is not.

The complete unreality of the Tax Court's viewpoint is well illustrated by a consideration of some of the *stipulated facts,* particularly the rental income and expense figures shown in Petitioner's Ex. 3 (Tr. 167):

Let us look at the depreciation figures for 1948 and 1949, *years in which admittedly the partnership was still renting 35 of the 95 houses.*

The depreciation figures for each of these two years were identical, viz.—$7,041.34. Divide this by 35 houses gives *$201.18 tax free depreciation dollars per year per house.*

Thus, in the 20 year period for which such loans are authorized (U.S.C.A. Title 12, Sec. 1709 (b) (3)) the total amount of tax free depreciation dollars would equal $4,023.60 which is slightly in excess of the $4,000.00 borrowed for each house so that THE TAX FREE DEPRECIATION DOLLARS ALONE WOULD PAY OFF THE WHOLE LOAN IN 20 YEARS.

That is obviously why the partners testified that they considered the rental deal a good investment.

The partners fully realized that it was a *good investment* to build 169 rental homes on 100% F.H.A. loans.

Thus, when Mr. O'Shea was asked if at the time the application for preference ratings were made, either he or McGah contemplated the *sale* of any of the 169 houses, he testified (Tr. 129):

> "A. *No, we did not.* At the time we entered into that application, *it was our full intention to embark upon a rental project,* because it looked as if it would be a very advantageous one to us financially, *inasmuch as we could secure 100% loans from the Bank through the F.H.A. insurance and by so doing we could receive 100% on no investment at all.* So it seemed to be a prudent thing for us to embark on it."

Also (Tr. pp. 128-129):

> "Q. What was the intention of the partners, Mr. McGah, with respect to the unsold houses, *the 95 remaining houses?*
>
> "A. It was our intention to retain those houses as a rental investment, *because it was evident that it was going to provide a good one from a financial standpoint.*"

The witness McGah also testified (Tr. 124):

> "Q. In renting these, in retaining and renting these 95 homes here referred to, Mr. McGah, was it your intention to hold them for rental investment?
>
> "A. Both".

Further, McGah testified as to the adequacy of a $50.00 per month rental (Tr. 124):

> "Q. (By Mr. Nyquist) Were you of the opinion that any of them could be profitably rented at $50.00 per month?
>
> "A. *I sure was*".

We respectfully submit that the Tax Court's determination that the fact that the taxpayers utilized 100% F.H.A. loans instead of their own capital shows a lack of purpose to produce income for investment purposes is *clearly erroneous* and that its analysis of the financial aspects of the case is utterly unrealistic.

It is respectfully submitted that the Tax Court's Opinion is contrary to law.

First, it has inferred an *abandonment* of the purpose to hold the 95 houses primarily for the production of rental income, contrary to law in that *abandonment* was not the inference *exclusively* required as a reasonable conclusion from the facts proven.

Second, it has construed Sec. 117(j) in a manner contrary to the declared purposes of the section and in a manner that fails to afford the relief which was intended by that section, as shown by the *Albright* case.

Third, it contrary to a long line of cases which hold that the fact that a taxpayer who sells property used in his *rental* business is also engaged in the business of selling the same kind of property does not deprive him of relief under Section 117(j).

Fourth, the long list of cases shows conclusively that the number and frequency of sales of property used in the taxpayers *rental* business does not put the seller in the property *selling* business or convert the property so used in the rental business to property held primarily for sale to customers in the ordinary course of trade or business.

The impressive list of decisions which we have cited shows that even though the taxpayer, engaged in the business of renting real and personal property, *decides to sell some of the property used in his rental business* and *then makes numerous sales thereof,* that neither his decision to sell nor the number or frequency of his sales deprives him of the relief afforded by Section 117(j) and does not put him in the house selling business or convert the rental property into property held primarily for sale to customers.

III.

THE TAX COURT ERRONEOUSLY CONCLUDED THAT "THE CENTRAL BANK WAS NOT DISPOSED TO CARRY SAN LEANDRO FOR ANY EXTENDED PERIOD OF TIME, ACCORDING TO THE RECORD BEFORE US", WHEREAS THE TAX COURT'S VERY OWN FINDING THAT THE BANK'S REQUIREMENT FOR FASTER LIQUIDATION RELATED TO ADDITIONAL BORROWING, RATHER THAN TO THE BORROWING RELATED TO THE 95 RENTAL HOMES WHICH THE TAX COURT FOUND WERE FINANCED AS 100% F.H.A. LOANS, NONE OF WHICH WERE SHOWN TO BE IN DEFAULT.

The above quoted statement from the Tax Court's opinion appears at Tr. 76:

> "* * * The Central Bank was *not disposed to carry San Leandro for any extended period of time,* according to the record before us. About one year after the project was completed, *it demanded faster liquidation of the original loan or loans. * * *"*

This statement in the opinion *is absolutely contrary to the stipulated facts* (Tr. 153).

The stipulated fact is that about the middle of 1944 the partners discussed with the bank

> "the possibility of securing MORE loans."

As a result of their desire to secure *more* working capital it was suggested that they liquidate *some* of their rental properties

> "in order to reduce their bank liabilities AND *as a means of* PROVIDING THEMSELVES *with additional working capital, suggesting* IN ADDITION *that they should take advantage of the then existing market for houses.*"

Thus, the *fact* is vastly different from the Tax Court's *opinion,* as quoted above.

It is *not* a fact that the Bank was "not disposed to carry San Leandro for any extended period of time" and that it therefore "demanded a faster liquidation of the original loan or loans."

What happened was that the partners wanted *more* loans, whereupon and in connection with the desire for *more* loans, the bank suggested that it sell *some* of its rental properties *as a means of providing themselves with working capital* AND in order to take advantage of the then market for homes.

In other words, the partners were told that if they wanted *more* capital, they had better provide *some* of it themselves by selling *some* of their rental homes.

But there is no evidence that *otherwise* the bank was not disposed to carry the original loan.

SUMMARY AND CONCLUSION.

The Tax Court's decision here under review is erroneous and completely unrealistic, both as to its *findings of fact* and its *conclusions of law.*

There can't be any question but that the partnership *was engaged in the house rental business* with real property held over 6 months.

The partnership was *formed* for that purpose, as original associate withdrew from the project *because* it *was* a *rental* project, priorities were obtained *for* a *rental* project, the 74 houses sold without being rented were sold for a reason fully explained by uncontradicted evidence (viz. the promised substitution of $50.00 per month rental priorities for the $39.99 per month units failed to materialize which was the *only* reason why the units were sold), the 95 remaining units were *rented* continuously to 156 defense workers for a period of 17 months before a single unit was sold, the partners, had they wanted to, could have sold the 95 units instead of renting them, there was a very active demand for houses by sellers during the entire period that they were being rented, the partnership sold houses because of the pressure exerted by the bank and sold 14 rental houses in 1944, (the tax year in question) *only as houses became vacant,* without advertising the houses for sale or displaying "for sale" signs, and at the end of the fiscal year, 1944 were *still renting* 81 of the houses. All rental operations were carried on by the partnership from an office which it maintained for that purpose.

The Tax Court made a finding that shortly before August 1, 1944, the partners "*abandoned*" their purpose

of holding these 95 homes primarily for the production of rental income.

Necessarily, this admits and proves that the partnership *had* the purpose of holding the 95 homes primarily for the purpose of producing rental income. The partners could not very well have *abandoned* a purpose which they did not have.

Thus, we say, there can be no doubt but that the partners *were in the house rental business with the 95 houses from the very time that the houses were completed, about March 15, 1943.*

At the end of its several fiscal years from 1944 to and including 1949 and on the very date of trial, the partnership was *still* in the house rental business *renting houses,* as follows:

End of Fiscal Year	Number of Houses Rented
1944	81
1945	50
1946	38
1947	35
1948	35
1949	35

With the market in 1944 described as "terrific",—you could sell 50 houses for every one you had,—houses could be sold without advertising,—it is completely unrealistic, in the light of the foregoing figures, even to suggest that the partners *ever* gave up their purpose to hold houses primarily for the production of rental income.

To be sure, *they sold some of the houses that were being used in the house rental business,*—sold them as

they became vacant and thus were entitled to the benefit of the relief provisions of I.R.C. Sec. 117(j).

The Tax Court's opinion again quite unrealistically questions how the partnership expected to repay these 100% F.H.A. loans with which it paid for the houses and the building sites.

It is clearly evident from Petitioners' Exhibit 3 (Tr. 167) that these were installment loans on a 20-year basis.

This is shown by the depreciation figures for the years 1948 and 1949, when there were no sales and when 35 houses were rented.

In each year, total depreciation was $7,041.34 which divided by 35 houses gives annual depreciation of $201.80 per house.

Multiply this figure by 20 years and you have just slightly in excess of $4,000.00,—*enough to pay off the loan in 20 years with tax free depreciation dollars,* assuming that the partners had no other means of payment, which assumption, in light of the evidence is *an assumption contrary to fact.*

The Tax Court's concept of this case on the *factual* side is thus demonstrably unrealistic and contrary to the evidence and hence *clearly erroneous.*

On the *legal* side, the opinion is also *clearly erroneous.*

The finding of fact that the partners ''abandoned'' their purpose of holding the 95 houses primarily for the production of rental income (aside from being false in fact) *is based on an inference made contrary to law,* as well as *contrary to the fact.*

The evidence shows that when subjected to pressure from the bank to sell *some* of the rental units (*not* "all" of them) the partners sold *some* houses as they became vacant.

There is no direct evidence in the record of their intention.

Their purposes and intentions are thus a matter of the *inference* to be drawn from the *facts* showing what they *did.*

The most that legitimately can be *inferred* from what they *did* is that *they decided to sell some of their 95 rental houses as they became vacant.*

The Tax Court, however, inferred that just prior to August 1, 1944, *they abandoned their purpose of holding the 95 rental houses primarily for the production of rental income.*

This was an inference *contrary to law.* We have cited the authorities which show that this inference was improper *because it was not the ONLY inference that could be drawn from the facts.*

It was equally proper to infer that *they intended to sell some of their rental units as they became vacant.*

The error of the Tax Court's inference of an abandonment of purpose is thus clearly evident.

But, adding error to error, the Tax Court also finds that after August 1, 1944, the partners held the 95 houses primarily for the purpose of sale to their customers in the ordinary course of their trade or business.

This finding is also based on an improper inference from the facts and an erroneous conclusion of law.

Several things seem to have impelled the Tax Court's erroneous conclusion in this respect:

First, the Tax Court points out that the partners were *also* engaged in the business of *selling* houses. *That the partners were also engaged in the business of selling houses is wholly immaterial, so far as their right to the benefits of Sec. 117 (j) on the sale of rental units is concerned.* This we have shown by an abundant citation of authority.

Second, the Tax Court relies on the number and frequency of sales (14 in 1944) as showing that the partners were in the house *selling* business. *That the number of rental unit sales made deprived them of the benefits of Sec. 117 (j) is a conclusion contrary to law,* as shown by the uniform allowance by the Tax Court of Sec. 117 (j) benefits in seven cases and by the Circuit Court in one decision, of such benefits in cases in which the sales of rental units were both numerous and frequent.

To disallow the benefits of Sec. 117 (j) upon the sale of real property used in trade or business and held for over 6 months because of the number and frequency of sales *is to completely nullify the purpose and intent of Sec. 117 (j).*

If a man who used an office building in his trade or business of operating an office building held for over six months, for the production of rental income, sells it for $500,000.00 and realizes a gain of $100,000.00, there is no

number and frequency of sales to deprive him of the benefit of Sec. 117 (j).

If a man, who has been renting 100 dwellings continuously for over 6 months for the primary purpose of producing rental income,—and who is not holding them primarily for sale to customers, sells them as they became vacant, for $500,000.00 and realizes a gain of $100,000.00, then, because he had 100 units to sell and sold them one by one, according to the Tax Court, he is *deprived* of the benefit of Sec. 117 (j) even though he used each house in his rental business right up to the very moment of its sale.

That is *not* what the Congress *said* and it is *not* what the Congress *meant* as is clearly shown in the many cases cited wherein the number and frequency of sales *did not* deprive the taxpayer of Sec. 117 (j) benefits. See *Albright v. U. S.* (CC 8) 173 F.2d 339, 344).

Thus we say and respectfully submit that the Tax Court's challenged findings and opinion are *clearly erroneous* and *contrary to law* and that the decision should be reversed.

Dated, Oakland, California,
March 2, 1951.

M. W. Dobrzensky,
Edward B. Kelly,
Attorneys for Petitioners.

No. 12,750

In the United States Court of Appeals for the Ninth Circuit

LUCILLE MCGAH, E. W. MCGAH, CAROLE O'SHEA AND JOHN P. O'SHEA, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion is the Tax Court's opinion, promulgated July 31, 1950 (R. 64-82), which is reported in 15 T. C. 69.

JURISDICTION

The taxpayers E. W. and Lucille McGah are husband and wife, as are also the taxpayers John P. and Carole O'Shea, making their returns on the community property basis. Their joint petition for review (R. 87-98) involves deficiencies determined by the Commissioner in the federal income taxes of each for the fiscal year of a partnership ended October 31, 1944, of which

E. W. McGah and John P. O'Shea were the sole partners, in amounts as follows: Against E. W. McGah, $8,452 (R. 33); against Lucille McGah, $8,452.01 (R. 18); against John P. O'Shea, $2,337.30 (R. 61); and against Carole O'Shea, $2,337.28 (R. 47). On July 26, 1948, the Commissioner mailed each taxpayer a notice of deficiency. (R. 28-33; 13-18; 57-61; 43-47.) Within 90 days thereafter, and on October 25, 1948, each of the taxpayers filed a petition with the Tax Court for a redetermination of such deficiency, under Section 272 (a) (1) of the Internal Revenue Code. (R. 20-33; 5-18; 50-61; 36-47.) The proceedings were, by joint motion of the parties, consolidated for hearing before the Tax Court. (R. 5.) The decision of the Tax Court in each proceeding that there was a deficiency in the tax was entered July 31, 1950. (R. 84; 83; 86; 85.) The proceedings are brought to this Court by petition for review filed October 26, 1950 (R. 87-98), under the provisions of Section 1141 (a) of the Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether there is evidence to sustain the Tax Court's finding that, in its fiscal year ended October 31, 1944, San Leandro Homes Company, a partnership of which the taxpayers, E. W. McGah and John P. O'Shea, were the sole partners, held 14 houses primarily for sale in the ordinary course of its trade or business, within the meaning of Section 117 (j) of the Internal Revenue code.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The facts were presented to the Tax Court partially by stipulation (R. 147-192) and partially by oral testi-

mony (R. 112-145). Its findings (R. 66-72) may be summarized as follows:

E. W. McGah and John P. O'Shea (referred to herein throughout as the taxpayers) were equal partners doing business under the firm name of San Leandro Homes Company, organized by them in 1942, whose business was building homes.[1] The partners contributed $13,500 in cash to the working capital of the partnership, which had been organized to construct 169 defense houses. The partnership obtained 169 lots in the City of San Leandro, California, in connection with which it assumed obligations of the seller of $88,725. On September 17, 1942, the partnership obtained preference ratings to build these houses, pursuant to which it was required to rent each of 69 of them for $39.99 per month and each of the remaining 100 for $50 per month. The priority ratings given the partnership did not, however, impose any restrictions upon the sale of the houses. The houses were constructed with "one hundred per cent [F.H.A. guaranteed] loans." In all, $676,000 was thus borrowed, i.e., $4,000 for the construction of each house, which was the cost thereof. (R. 66-69.) As the construction progressed, the tax-

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[1] With respect to the taxpayers, Lucille McGah and Carole O'Shea, it is sufficient to say that, as explained more fully under the heading "Jurisdiction," *supra*, Lucille McGah was the wife of the taxpayer, E. W. McGah, and Carole O'Shea was the wife of the taxpayer, John P. O'Shea. Since one-half of the profits of the partnership here in question constituted the community property of McGah and his wife and one-half thereof the community property of O'Shea and his wife, the wives filed separate returns for the taxable year 1944, here in question, in which each reported her share of community profits, and the Commissioner determined separate deficiencies against each in respect thereof. (R. 65.) McGah and O'Shea were also members of several other partnerships in 1944, in one of which, namely, Brennan, McGah and O'Shea, McGah and O'Shea each had a 25 percent interest. This firm was also engaged in the construction and sale of F.H.A. financed houses and constructed and sold 121 of them in 1944. (R. 66.)

payers knew that the sales price of each house would be close to $5,000 or $5,100. They also knew that it would be unprofitable to rent any of the houses for $39.99 per month, though they considered that their rental at $50 per month would be profitable. (R. 69.)

When, at the end of 1942 or in the beginning of 1943, the taxpayers ascertained that they would not be permitted to charge more than $39.99 rent for each of the 69 houses referred to, they decided to sell them, together with 5 others situated in their immediate vicinity, and did sell, altogether, 74 houses during the partnership's fiscal year ended October 31, 1943, at a net profit of $88,691.20. None of these houses had ever been rented. (R. 69-70.) Each of the remaining 95 houses were rented from and after March 15, 1943, at $50 per month and were occupied by 156 different tenants between that time and August 14, 1944. (R. 70.)

In the middle of March, 1944, the taxpayers wished to borrow more money for the construction of additional houses, and their bankers thereupon suggested to them, in a manner which was more or less a demand, that they liquidate some of their properties in order to reduce their bank indebtedness. Accordingly, the taxpayers decided to sell some of the houses. There was a large demand for them at that time. And, as tenants moved out, they sold 14 of the houses through brokers in the partnership's fiscal year ended October 31, 1944; 31 in its fiscal year ended October 31, 1945; 12 in its fiscal year ended October 31, 1946, plus an additional house purchased and rented during that year; and 3 in its fiscal year ended October 31, 1947. Thus, during the period from about March 15, 1943, to October 31, 1947, 134 out of the 169 houses built were sold, leaving 35 on hand, which were all rented. (R. 70-71.) Selling prices ranged from $5,500 to $6,000,

and the net profit per house sold from $1,768.69 to $2,281.61. The net profit on the sale of the 14 houses sold in 1944 was $27,936.51, of which $17,176.20 was realized in that year under installment payments. The sales of the houses made during the three months' period remaining in the partnership's fiscal year ended October 31, 1944, were continuous and frequent. The profits from rents during the partnership's fiscal year ended October 31, 1944, amounted to $4,306.63; they amounted to $2,449.40 in its fiscal year ended in 1945; there was no profit from rents in its fiscal year ended in 1946, but a loss of $1,209.67; and, in its fiscal year ended in 1947, there was a rental profit of $629.57. (R. 71-72.)

In the middle of 1944, the partnership made further application for loans from the same bank, which were eventually obtained. With these it built more houses, which, with the exception of a few that were rented, were also sold. (R. 72.) On the basis of the evidentiary facts thus found, the Tax Court further found that, shortly before August 1, 1944, the taxpayers decided to sell the houses in order to obtain capital for further construction operations, and that they then abandoned the purpose of holding the houses primarily for the production of rental income; that they decided to sell the houses as tenants occupying them under oral month-to-month tenancies vacated them; that the business of the partnership from August 1, 1944, to the end of its fiscal year ended in 1944, was the sale of houses and that during this fiscal year the houses were held by the taxpayers primarily for sale to customers in the ordinary course of their trade or business, and not primarily for investment purposes. (R. 72.)

Accordingly, the Tax Court sustained the Commissioner's determination. (R. 82.)

SUMMARY OF ARGUMENT

The case of *Rollingwood Corp.* v. *Commissioner,* No. 12,728, pending in this Court on the taxpayer's petition for review of the decision of the Tax Court therein, presents the same question here presented, upon a somewhat similar state of facts. The several arguments made by the Government in its brief in that case leading up to a discussion of the facts therein are pertinent here and are therefore incorporated herein by reference.

As in the *Rollingwood* case, so here, the evidence adduced before the Tax Court sustains its finding that the houses in question were held by the taxpayers, in the taxable year here in question, primarily for sale to customers in the ordinary course of their trade or business. This Court has consistently held that whether property is held by a taxpayer primarily for sale, within the meaning of the capital gains provisions of the federal taxing statutes, is essentially one of fact. The result is that the taxpayers are not entitled to a review of those facts here as upon a trial *de novo.* But that is precisely what they seek here.

The testimony of the taxpayer O'Shea, upon which the taxpayers particularly rely, was discredited by the Tax Court. This is to the effect that they constructed 95 of a total of 169 houses as a rental investment project and continued so to hold them in the taxable year here in question. It was principally on the basis of this testimony that the taxpayers made two contentions below, which they repeat here, namely, (1) that when the houses were completed in about February 1943, their purpose was to hold the 95 houses, above mentioned, for investment purposes, to be rented, and thereby to produce income in accordance with an investment purpose, and (2) that a valid differentiation was to be made, between their purpose with respect to a group of 74 of a total of 169 houses built by them in

1942, which they had sold in 1943, and their purpose with respect to the remaining 95 houses, 60 of which they sold in the years 1944 to 1947, inclusive.

Assuming, nonetheless, but only *arguendo,* that these contentions of the taxpayers were sound and supported by the evidence, the Tax Court found that, when they determined to sell the 95 remaining houses, or at least some of them, in 1944, they "abandoned" their purpose of holding them "primarily for the production of rental income." The taxpayers' contention that there is no evidence to support this finding is pointless, in view of the fact that their sales activities were substantial, both in point of the volume of sales and of their continuity. Other circumstances confirm this view, such as the fact that their obligations to the bank on loans with which the houses were constructed could not have been discharged except by the sale of the houses; also that their profits from such sale far exceeded their profits from rentals. The retention for rental purposes of the remaining 35 debt-free houses does not support the taxpayers' contention as to their alleged primary rental purpose. Nor does the evidence support their contention that they expected to pay for the houses out of depreciation allowances. These were not nearly enough to discharge the loans.

The taxpayers cannot complain that their purpose was judged by what they actually did.

The cases upon which the taxpayers rely to sustain their contention do not in fact do so. Each of these was decided upon its own particular facts. No general principles were laid down or applied in them which, if applied here, would require a reversal.

ARGUMENT

There Is Ample Evidence to Support the Tax Court's Finding That, in the Taxable Year Here in Question, the Taxpayers Held 14 Houses Primarily for Sale to Customers in the Ordinary Course of their Trade or Business, Within the Meaning of Section 117 (j) of the Internal Revenue Code

Preliminary

The case of *Rollingwood Corp.* v. *Commissioner,* No. 12,728, brought to this Court by the taxpayer therein for review of an adverse decision of the Tax Court, with the case of *David D. Bohannon* (as transferee of the corporation's assets) v. *Commissioner,* No. 12,729, presents the same question upon a somewhat similar state of facts as is presented in the case at bar. That is to say, the ultimate question in the *Rollingwood* case, as here, is whether the evidence sustains the finding of the Tax Court that houses built with F.H.A. guaranteed loans were held by the taxpayer primarily for sale to customers in the ordinary course of a trade or business.

To be sure, all of the facts in the *Rollingwood* case were stipulated, whereas, here some oral testimony was adduced by the taxpayers in order to supplement the stipulated facts. Even so, Subpoints A to D, inclusive, made by the Government in its brief in the *Rollingwood* case, and leading up to Subpoint E, wherein the facts in that case were marshalled, are pertinent here and, if not incorporated by reference, would have to be repeated here. Since we do not deem it necessary to do that, we shall content ourselves with referring the Court, as well as taxpayers' counsel in the case at bar thereto; and, in order to advise counsel of the nature of the arguments made by the Government in its *Rollingwood* brief in support of those points, we are serving copies of the brief in that case upon them, together with copies of the Commissioner's brief in this case.

The points referred to are as follows:

A. *To sustain the Tax Court's decision on the facts of this case, it is immaterial how the word "primarily" is defined in the context of Section 117* (See *Rollingwood* Br. 6-7.)

B. *Under the decisions of this Court, the question whether property is primarily held by the taxpayer for sale in the ordinary course of a business is regarded as depending solely on the nature and extent of his sales activities* (See *Rollingwood* Br. 7-9.)

C. *The Supreme Court has defined the word "principal" to mean "fundamental," "essential," and hence "substantial" in a similar situation where it regarded it necessary to do in order to implement the purpose of the statute* (See *Rollingwood* Br. 9-11.)

D. *The legislative history of the capital gains provisions discloses a continuing Congressional purpose sharply to distinguish taxwise between property held for sale in the ordinary course of a trade or business and that which was not so held* (See *Rollingwood* Br. 11-15.)

We turn to a discussion of the facts in the case at bar.

E. *The facts in the case at bar, together with proper inferences to be drawn therefrom, sustain the Tax Court's finding on any view that may be taken of the statute*

As pointed out under Subpoint B in the *Rollingwood* brief, *supra,* this Court has consistently held that whether property is held by the taxpayer primarily for sale within the meaning of the capital gains provisions of the Internal Revenue laws is primarily one of fact. The *per curiam* decision of the Court in the case of *Rubino* v. *Commissioner,* 186 F. 2d 304, which is the last case decided by this Court involving the same question, is expressly predicated upon that view. That

being so, we think it pointless for the taxpayers to reargue their case here, as upon a trial *de novo,* which is what they have done. See *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 394-395. The fact that review of the decisions of the Tax Court now proceeds upon the principles of the review of the District Courts in nonjury cases does not signify that the taxpayer is entitled to another trial on the facts here, or that on such trial, it is entitled to have this Court evaluate anew the credibility of the witnesses and the weight to be given their testimony in the framework of the facts as otherwise established, taken together with the reasonable inferences to be drawn therefrom, which may or may not be in accord therewith depending upon the view taken by the trier of the facts. And yet, that is precisely what the taxpayers seek to have this Court do.

Thus, the taxpayers contend (Br. 21-30) that, when the 169 houses were built in February 1943, their purpose was to hold all of them for investment purposes, i.e., to hold them for rental, with the exception of 69 of them (later increased to 74), which could not be rented at a profit because of the low rent which the taxpayers were required to charge therefor under the priority application. In this connection, the taxpayers further contend that they did not abandon the purpose in 1944 with respect to the 95 houses which remained after the sale in 1943 of 74 of them, when they determined in the middle of 1944 to sell at least some of the remaining houses as they became vacant, and when, in accordance with such determination, they sold 14 of them in the last three months of the partnership's fiscal year ended October 31, 1944.

The Tax Court made it perfectly clear in its opinion (R. 74-75) that it regarded the taxpayers' contention, that upon the completion of the houses they intended to hold 95 of them for investment purposes, as unsound

and that it did so because it gave little or no credence to the only evidence supporting it. This was the testimony of the taxpayer O'Shea, who had testified that it was his, as well as his partner, McGah's, intention to retain the 95 houses referred to as a rental investment, and that, therefore, a valid distinction was to be made between the taxpayer's primary purpose with respect to the 74 houses, which admittedly was their sale, and the taxpayers' primary purpose with respect to the remaining 95 houses, which assertedly was their rental. But, as we shall presently undertake to show, there is literally no evidence in this record, aside from the testimony of O'Shea referred to, which would justify an inference that the taxpayers' purpose had ever been to hold either all of the houses, or all of them but the 74 which they sold in 1943, as a rental investment project. The best that can be said of the evidence adduced is that, as the Tax Court found, the taxpayers originally contemplated renting all of the houses, provided that all could be rented for $50 per month. (R. 68.) And, of course, as we have said, they soon found out they could not do that; the upshot being that they commenced to sell the houses and did not stop until all but 35 of them had been sold, which, as we shall presently show, undoubtedly became debt free as a result of the sale of the others.

In any event, the Tax Court found that the taxpayers soon found out, as stated, that they could not get permission to raise the rent of the 69 houses from $39.99 to $50 per month, and that they accordingly decided to sell them, together with five others situated in their vicinity, making 74 in all, and that they did so in 1943 at a profit of $82,691.20. (R. 69-70.) In this connection, the Tax Court further found that thereafter, about the middle of 1944, the taxpayers' bank suggested, in a manner which indicated a demand, that,

in view of the fact that they wanted to borrow more money in order to build more houses, which they did, they liquidate some of the houses they then owned, since they already owed the bank in excess of $350,000. They immediately resumed their sales activities, and did not stop until at the end of the fiscal year ended on October 31, 1947, they had sold all but the 35 houses above-mentioned. They sold 14 of these houses in the last three months of the partnership's fiscal year ended October 31, 1944; 31, in its fiscal year ended October 31, 1943; 12, in its fiscal year ended October 31, 1946, plus an additional house which they had purchased and rented that year; and 3, during the partnership's fiscal year ended October 31, 1947. Thus the taxpayer's sold 134 of the original 169 houses, leaving only 35 of them on hand in 1947, as stated, which they have continued to rent. (R. 69-71.) Since the houses sold for between $5,500 and $6,000, the taxpayers' profit on the sale of each was between $1,500 and $2,000. (R. 71.)

Moreover, as the Tax Court pointed out in its opinion (R. 74), the houses cost $4,000 to build and, since they were built entirely with money borrowed on F.H.A. guaranteed loans, such loans must have aggregated $676,000 (169 x $4,000). Indeed, it is this circumstance which caused the Tax Court to pose the obvious question as to how the taxpayers expected to pay the loans which they had obtained to build the houses and how long it would take to work out the project from the viewpoint of the financing which was adopted. But the only answer to this question is the obviously disingenuous assertion of O'Shea that, at the time they made the application for priorities, it looked as if the project would be a very advantageous one to them financially, inasmuch as they could procure 100 percent loans from the bank through the F.H.A. insurance and by so

doing could receive 100 percent on no investment at all. (R. 129.)

In a belated attempt to support this assertion here, the taxpayers now argue (Br. 55) that the depreciation allowances, which they figure at $201.18 per house per year, would in the 20 years for which the loans were authorized have paid them off. The difficulty with this assertion is twofold.

In the first place, neither of the taxpayers made any such calculation when they went into the venture. While depreciation was mentioned by O'Shea in a general way in his cross-examination, he testified that they did not know what their depreciation allowances would be at the time they built the houses, and not until some years later. (R. 139.) In the second place, it appears from the record that, in the years 1942 and 1943, the depreciation was actually figured on the basis of a 16⅔-years life for the houses (R. 169, 175), and there is no evidence that it was figured upon any other basis thereafter. But a $201.18 depreciation allowance per house per year would amount to only $3,528.88 in 16⅔ years.

On the other hand, the sale of the 95 remaining houses at a minimum of $5,000 each was obviously more than enough to pay off the loan of $4,000 on each of them. In this connection, McGah had testified that, at the time the houses were built, he knew they would all sell for approximately from $5,000 to $5,100 each and that, as they got along on the project, they knew what profit they would make per unit upon the sale of the houses. (R. 138.) Of course, the 14 houses here in question actually sold in 1944 and 1945 for from $5,500 to $6,000 each, as stated, and the net profits on each house sold ranged from $1,768.69 to $2,281.61. (R. 71.) Similarly, the 74 houses sold in 1943 had been sold at a net profit of more than $82,691.20, or at a net profit of

more than $1,000 per house. (R. 70.) In other words, they, too, must have been sold for more than $5,000 each.

Moreover, since, as has already been indicated, the taxpayers received on the sale of the 60 houses which they sold between 1944 and 1947 an amount far in excess of the construction loans they had made on them, it is reasonable to assume that they had wiped out their entire indebtedness to the bank so far as concerns this property and that, consequently, the 35 houses which they had retained were then debt free. Indeed, as their sales progressed, their debt to the bank must have been reduced from time to time, so that it became less and less burdensome, until it was finally wiped out. Of course, in the meantime, the taxpayers continued to rent the houses until they were sold. But, from that fact alone, no inference need necessarily be drawn either of an original or of continuing primary purpose to hold the houses as a rental investment project, as the taxpayers contend. (Br. 28-29.) And, certainly, no such inference is justified from the fact that they held a relatively small residue of debt free houses for rent after 1947.

In short, the fact of the matter is that the taxpayers had no adequate way to pay off the loans other than by selling the houses, and this they accordingly did. It cannot be gainsaid that the taxpayers had a profit motive in entering into this transaction. Nor can it be gainsaid that their conduct was equivocal. The taxpayers, therefore, cannot complain because their equivocal conduct was viewed by the Tax Court in the light of their manifest interest and purpose. As Mr. Chief Justice Hughes said in his opinion in *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, 559-560:

> Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to

> complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough.

It is thus apparent that, since, in the circumstances here, the Tax Court, was obviously not required to accept the testimony of the taxpayer O'Shea (See *Joe Ballestrieri & Co.* v. *Commissioner,* 177 F. 2d 867, 874-875 (C.A. 9th), and cases there cited; also *Helvering* v. *Nat. Grocery Co., supra* (304 U. S. 282, 295), and *Helvering* v. *Stock Yards Co.,* 318 U. S. 693, 701), there is no evidence to compel a finding that they held these houses primarily for rent rather than for sale.[2]

This, then, is the background of the Tax Court's theory of "abandonment," against which the taxpayers so strenuously inveigh. (Br. 21-58.)

The precise finding of the Tax Court in this respect is that, shortly before August 1944, the taxpayers decided that they should sell the houses in order to obtain capital for further construction operations, and that they then "abandoned the purpose of holding the houses primarily for the production of rental income"; concluding that the taxpayers' business from before August 1, 1944, to the end of the partnership's fiscal year ended October 31, 1944, was the sale of houses and that, at the time houses were sold during that fiscal year, they were held by the taxpayers primarily for sale to customers in the ordinary course of their trade or business, and

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[2] Of course, the Tax Court did not expressly say that it did not believe O'Shea's testimony to be true. Instead, it said (R. 75) that it assumed only *arguendo* that the taxpayers' contentions were sound and supported by the evidence. It was unnecessary for the Tax Court to say that it did not believe O'Shea's explanation of the taxpayers' intentions. To imply, as it did, that it was not satisfactory, or that it did not satisfactorily explain the situation is more polite and less offensive, and at the same time equally sufficient. *Stone* v. *United States,* 164 U. S. 380, 382.

not for investment purposes. (R. 72.) Again we say that the Tax Court here clearly used the word "primarily" in the sense of "chiefly" or "principally." In other words, the Tax Court gave the statute its most liberal construction and that for which the taxpayers contended.

From what has been said, it is apparent that the Tax Court did not use the word "abandonment" in its absolute sense, as the taxpayers conclude. (Br. 21-30.) That is to say, the Tax Court did not, as the taxpayers contend, find or hold that they had entirely abandoned their rental purpose or their rental business prior to August 1944, and that they were thereafter engaged solely in the business of selling houses. The very statement of the Tax Court that they abandoned their purpose of holding the houses "*primarily* for the production of rental income" (italics supplied for emphasis), qualifies the word "abandonment" and negatives the taxpayers' contention that the Tax Court's finding implied an absolute abandonment of their rental purpose.

Moreover, in explaining its finding of abandonment, the Tax Court, in its opinion, repeatedly used the word "change," or "changed." Thus, it said (R. 76) that the taxpayers' original rental purpose was "changed" about February or March 1943 with respect to the 74 houses, at least, and that (R. 77), upon all the evidence, it must be concluded that at some time prior to August 1, 1944, the taxpayers "changed" their "alleged" original purpose with respect to the 95 houses held by them from the purpose of holding them primarily for investment, to holding them primarily for sale, and sold them as they became vacant; concluding (R. 78) that the question in the case became concerned with whether the original purpose of holding property was "changed" and, if so, when.

In support of its view that the taxpayers' original investment purpose, if such existed, was changed in February or March 1944, the Tax Court pointed out in its opinion (R. 75-76) that the taxpayers first decided to sell 74 of the houses and that the evidence further showed that they next decided to sell at least some of the others and that, of the 95 remaining houses, 60 in all were sold between August 1944 and October 31, 1947. The Tax Court further said (R. 77) that the evidence showed that, at some time subsequent to the taxpayers' conference with the bank officers in the middle of 1944, at which the bank suggested (demanded) that they sell some of the houses and pay off some of their loans as a basis for obtaining further loans with which to finance the building of more houses, they did obtain such loans and therewith built such houses, all of which they also sold, except a few which they retained.

We therefore submit that there is ample evidence to sustain the Tax Court's finding that, during the latter part of the partnership's fiscal year ended October 31, 1944, the taxpayer held the houses here in question primarily for sale to customers in the ordinary course of the taxpayers' business within the meaning of Section 117 (j) of the Code (Appendix, *infra*). This is so even though the word "primarily" is deemed to have been used by Congress in this section as meaning "chiefly" or "principally" rather than "essentially" or "fundamentally." And, of course, there can be no question at all about this if "primarily" was used in the latter sense. For in that sense, the taxpayers were obviously engaged in a primary way in the sale of these houses, since their sales activities after August 1944 were substantial in that the sales they made were both frequent and continuous and involved more than two-thirds of the 95 houses which remained after the initial sales of the 74 of them in 1943. Indeed, the taxpayers' sales activities

were far more substantial than their rental activities, if these may be judged by the profits they made in each of the activities.[3] This is best illustrated by the following table so far as the record discloses (R. 70-72, 167):

Fiscal year ended	Rental Profits	Sales Profits
October 31, 1943	$ 1,956.02	$82,691.20
October 31, 1944	4,306.63	27,936.51
October 31, 1945	2,449.40	Not shown in record
October 31, 1946	(1,209.67)*	" " " "
October 31, 1947	629.57	" " " "

* Loss

There remains briefly to consider the taxpayers' contentions (Br. 31-58) that their sales activities in 1944 and subsequent years were immaterial in determining the nature of their activities, regardless of the number and frequency of the sales, so long as the originally contemplated rental operations continued.

The complete refutation of this contention lies in the decisions of this Court referred to in Subpoint B, and cited in the Commissioner's brief (pp. 7-8) in the *Rollingwood* case. As therein pointed out, this Court in the cases of *Richards* v. *Commissioner,* 81 F. 2d 369, 373; *Commissioner* v. *Boeing,* 106 F. 2d 305, 309, certiorari denied, 308 U. S. 619; and *Ehrman* v. *Commissioner,* 120 F. 2d 607, 610, held that the answer to the question whether property was held primarily for sale within the meaning of the capital gains provisions of the statute revolves largely around the frequency and continuity of the transactions claimed to result in a trade or business. And the *per curiam* decisions of this Court in *Field* v. *Commissioner,* 180 F. 2d 170, and *Rubino* v. *Commissioner,* 186 F. 2d 304, rest upon the

[3] The taxpayers argue (Br. 47) that the disparity between income from sales and rentals is not controlling here, citing *Delsing* v. *United States,* 186 F. 2d 59 (C.A. 5th). As we shall hereinafter show, that decision rests upon its own particular facts and is not controlling here, even assuming it to have been correctly decided, which we respectfully question.

same principle. It is, of course, not necessary, as this Court has also held, that the sales activities be the taxpayers' only occupation or business. *Harvey* v. *Commissioner,* 171 F. 2d 952. See also to similar effect, *Snell* v. *Commissioner,* 97 F. 2d 891 (C.A. 5th). Nor is it necessary that he devote any time personally thereto. *Ehrman* v. *Commissioner,* 120 F. 2d 607 (C.A. 9th); *Brown* v. *Commissioner,* 143 F. 2d 468 (C. A. 5th). If so, there can be little doubt that a material change in the taxpayers' activities with respect to property is not to be regarded as without possible tax significance; and whether it is or not must necessarily depend largely upon the character and extent of the change, that is, upon the frequency and continuity of the transactions constituting the new activity.

The four Tax Court decisions cited by the taxpayers under their second point (Br. 31-51), which involve the sale of houses, do not support their contention that the Tax Court resorted to improper criteria in concluding that they had abandoned their rental purpose and that from August 1, 1944, to the end of the fiscal year ended October 31, 1947, they were holding the houses primarily for sale in the ordinary course of their business.[4] A perusal of these cases will disclose that in

[4] The taxpayers also cite other cases involving the sale of securities, livestock, etc. Space will not permit us to discuss these here. It suffices to say that, if the cases which involve the sale of houses do not serve their purpose, cases involving securities and other property obviously cannot do so; for each of these, no less than those which involve the sale of houses, depends upon its own particular facts. We are not unmindful of a fact that the taxpayer has cited the Eighth Circuit's decision in *Albright* v. *United States,* 173 F. 2d 399, and this decision has now been approved and followed by the Fifth Circuit in the case of *United States* v. *Bennett,* 186 F. 2d 407, wherein the court construed the word "primarily" as used in Section 117 (j) to mean "first" or "chief." We believe this construction of the statute to be erroneous and that it thwarts the purpose of Congress to capture the ordinary tax on what obviously is business income, i.e., income derived from the sale of property held by the taxpayer for sale in the ordinary course of his trade or business, even though it is also first used therein.

none of them did the Tax Court undertake to lay down a rule that a taxpayer cannot be deemed to have "abandoned" a purpose to hold F.H.A. financed houses primarily for rent, merely because he continued to rent such houses as he did not sell. Nor do these decisions specify any criteria for determining under what circumstances the taxpayer may be regarded as having "abandoned" a rental purpose as a primary one. To the contrary, as has already been indicated, each one of these cases was decided on its own particular facts, and on the theory that each case presented essentially a question of fact rather than a question of law.

Thus, in *Elgin Building Corp.* v. *Commissioner,* decided February 15, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,015) (Br. 31, 40), it appeared that three corporations, of which the taxpayer was one, were organized by three individuals who became their sole stockholders, for the purpose of constructing defense houses. The corporations were dissolved and the houses owned by each transferred by it to an agent and trustee of a partnership organized by the three stockholders of the corporations for the purpose of taking over the houses and selling them. Thereafter, the partnership sold the houses. The Commissioner attributed the sales to the corporations. The Tax Court merely held that this was not justified on the facts.

In *Robertson* v. *Commissioner,* decided September 29, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,234) (Br. 32, 43), the sales of the housing units were held to be exceptional. In the two taxable years there in question only 12 units were sold out of a total of 416 that had been built.

In *Ferguson* v. *Commissioner,* decided March 21, 1950 (1950-P-H T. C. Memorandum Decisions, par. 50,071) (Br. 32-33, 45), the Tax Court specifically recognized the fact that frequency and continuity of

sales was the primary consideration. It refused to apply the test in that case only because, under its particular facts, it appeared that the sales were to tenants who had requested the taxpayer to sell, and further that the taxpayer sold under pressure put upon it by banks to repay loans.

Farry v. *Commissioner,* 13 T. C. 8 (Br. 33, 41), was, as the Tax Court pointed out in its opinion (R. 80), relied on by the taxpayer in this case. But, as the Tax Court said, the taxpayer there had between 1941 and 1944 acquired by purchase or construction about 140 rental units, some of which were duplex apartments. It was not until 1944, however—that is, not until three years later—that the taxpayer concluded to sell any of them. He sold 19 rental properties in 1944 and 27 in 1945, which had been rented from 6 months to more than 11 years. The Tax Court said that it seemed to it that the taxpayer had proved by overwhelming evidence that the rental properties were held primarily for investment and that the fact that he had received satisfactory offers for some of them and sold them does not establish that he was holding them primarily for sale to customers in the ordinary course of his business.

There remains only to consider the case of *Delsing* v. *United States,* 186 F. 2d 59 (C.A. 5th), already adverted to, which the taxpayers cite in their brief (pp. 34, 47-48). In that case, the Fifth Circuit reversed the decision of the Tax Court holding that the F.H.A. financed houses there in question were held by the taxpayer primarily for sale. While we think that the Fifth Circuit should not have reversed the Tax Court's findings in that case, we recognize that that was a close case. The court pointed out that the houses were constructed under definite restrictions as to their sale and were rented from 1942 to 1945, without any sales

being made. Sales were then effected because returning veterans sought to buy them. It is quite true, as the court said, that the Commissioner had relied primarily upon a statement in the taxpayer's priority application to the effect that the houses were to be built for sale and rent, and that during 1945 the taxpayer's income from sales greatly exceeded its income from rent. However, the court thought that the statement in the application had been over-emphasized in view of the restrictions actually placed upon the sale of the houses, and it regarded the disparity between income from sales and rent as not controlling. Of course, the circumstances here are entirely different. Thus, regardless of whether the *Delsing* case was correctly decided or not, so far as concerns any question of law which the Fifth Circuit was called upon to apply in that case, its decision therein stands only for the proposition that, under the particular facts of that case, the finding of the Tax Court was clearly erroneous.

CONCLUSION

For the reasons stated, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

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APRIL, 1951.

APPENDIX

Internal Revenue Code:

SEC. 117. CAPITAL GAINS AND LOSSES.

*　　*　　*　　*　　*

(j) [As added by Sec. 151 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127 of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of Property Used in the Trade or Business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l) held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) *General Rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and

losses from sales or exchanges of capital assets hold for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

*   *   *   *   *

(26 U. S. C. 1946 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.117-7 [As amended by T. D. 5394, 1944 Cum. Bull. 274, 276]. *Gains and Losses from Involuntary Conversions and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—Section 117 (j) provides that the recognized gains and losses

(a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

(1) of a character subject to the allowance for depreciation provided in section 23 (l), or

(2) real property,

provided that such property is not of a kind which would properly be includible in the inven-

tory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, and

* * * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets.

* * * * *

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No. 12,750

United States Court of Appeals
For the Ninth Circuit

Lucille McGah, E. W. McGah, Carole O'Shea and John P. O'Shea,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

PETITIONERS' CLOSING BRIEF.

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PETITIONERS' CLOSING BRIEF.

INTRODUCTION.

We have read and carefully reviewed Respondent's Brief together with his brief in the *Rollingwood* case, which he served with it.

It must be borne in mind that most of the facts in this case are either stipulated, or are in documentary form.

That the taxpayers were in the house rental business with their 95 houses is a *stipulated fact** (Tr. 150-151).

There are no conflicts in the evidence and the central point in the Tax Court's findings, is the finding, *based*

*Unless otherwise stated, all emphasis in this brief is ours.

entirely on an inference, that the taxpayers ABANDONED their *purpose* of holding the 95 rental units *primarily* for the purpose of rental-investment.

There is *no direct evidence whatsoever* in the record of any intention on the part of taxpayers to abandon this purpose.

This Court is not bound by any *inferences* which the Tax Court drew from the undisputed facts.

It has both the capacity and the authority to *draw its own inferences,* as we shall show in a subsequent portion of this brief.

Before proceeding to discuss the main issues presented, we desire to comment upon some minor points raised by Respondent's Brief:

IT IS ADMITTED THAT THE QUESTION WHETHER PROPERTY IS HELD PRIMARILY FOR SALE IS ESSENTIALLY ONE OF FACT.

We have no quarrel with this proposition, but we wish to point out here that the *crucial* finding of fact made by the Tax Court,—that the taxpayers *abandoned their purpose* to hold the houses primarily for rental-investment, *is based on an inference* drawn by the Tax Court from the facts, which are not in dispute.

As we have shown in our Opening Brief, that *inference* is *contrary both to the facts and to the law.*

At pages 9-10 of his Brief, Respondent, referring to this Court's decision in *Rubino v. Comm.,* 186 F. 2d 304, (which he says holds that the question whether property

is held by the taxpayer primarily for sale etc. is essentially one of fact) says:

> "That being so, we think it is pointless for taxpayers to reargue their case here, as upon a trial *de novo,* which is what they have done. * * *"

We propose to argue this case fully to present to this Court the background which will enable *this* Court to draw a *correct* inference from the facts and that *correct* inference is that petitioners *never* abandoned their purpose of holding the 95 houses primarily for rental-investment purposes.

THERE IS A VALID DIFFERENTIATION TO BE MADE BETWEEN TAXPAYERS' PURPOSE WITH RESPECT TO A GROUP OF 74 OF THE TOTAL OF 169 HOUSES BUILT, WHICH 74 HOUSES TAXPAYERS SOLD WITHOUT EVER HAVING RENTED THEM.

Respondent's Brief, p. 6, refers to this differentiation made by the taxpayers.

The differentiation is clearly established by the Findings of Fact themselves (Tr. 68—See *Appendix,* p. i).

What they did and *why* they did is now clearly shown by the findings (Tr. 69-70—*Appendix,* p. ii).

There *is* thus a *clear* and *sharp* differentiation of purpose with respect to the 74 units sold without ever having been rented and the 95 units which were rented at $50.00 per month. *This differentiation of purpose is shown by the Tax Court's findings.*

IT IS NOT TRUE THAT TAXPAYERS' OBLIGATIONS TO THE BANK ON LOANS WITH WHICH THE HOUSES WERE CONSTRUCTED COULD NOT HAVE BEEN DISCHARGED EXCEPT BY A SALE OF THE HOUSES.

This refers to page 7 of the Respondent's Brief and to the Tax Court's opinion (Tr. p. 75).

We have shown in our Opening Brief (page 55) that it is a *stipulated fact,* as shown in Exhibit 3 (Tr. 167) that the depreciation figure for the 35 houses on rental in each of 1948 and 1949 was identical—$7,041.34. Divide this by 35 gives $201.18 in TAX FREE DEPRECIATION DOLLARS *per annum per house,* which would have provided all the funds necessary to pay off each 100% $4,000 loan in 20 years,—the period it had to run.

Because the Tax Court could not understand this is no fault of the taxpayers.

One other fact that Respondent overlooks in this connection: The Transcript shows (pages 119-121 and 174-192) that the taxpayers *had other means* and *were engaged in many businesses.*

The statement that they lacked other income to pay off their obligations in San Leandro is simply not true.

THERE WAS NO EQUIVOCAL CONDUCT ON THE PART OF THE TAXPAYERS.

Respondent at page 14 of his Brief says that taxpayers' conduct was equivocal.

Again we refer the Court to our Opening Brief, pages 4-18 where the facts are accurately recorded and they show *no equivocal conduct.*

THE RECORD ABOUNDS WITH UNCONTRADICTED EVIDENCE (ORAL, STIPULATED AND DOCUMENTARY) OF THE FACT THAT TAXPAYERS' PURPOSE WAS TO HOLD THE 95 HOUSES PRIMARILY FOR RENTAL-INVESTMENT PURPOSES.

This refers to what is said at page 11 of the Respondent's Brief.

We call attention to the careful, correct and detailed statement of facts proven, shown at pages 4-18 of our Opening Brief which abounds with *uncontradicted evidence* of the taxpayers' rental-investment purpose *from the very inception of their enterprise.*

The withdrawal of a former associate *because* the deal *was* a rental deal, the application for and granting of *rental* priorities, the sale of 74 houses because a promised substitution of $50 per month *rental* units could not be made, the actual and bona fide *rental* of 95 units for over 17 consecutive months to 156 tenants before the first unit was sold, the *stipulation* that each house sold had been *rented* continuously from the date of completion until its sale, the fact that houses were *rented* when they could have been very profitably sold without effort, the fact that the *rental* operation has not yet ceased, proves conclusively that the taxpayers *did* have the purpose of holding the houses *primarily for rental investment* and sold houses, as they became vacant, *only* because of the pressure exerted on them by the bank.

This evidence can be *ignored,* but it cannot be *denied.*

THERE IS NO REASON FOR SUGGESTING THAT THE TESTIMONY OF THE TAXPAYERS WAS NOT TRUE.

Respondent's Brief, page 15, in a footnote, says that the Tax Court did not expressly say that it did not believe O'Shea's testimony to be true, but that it assumed only *arguendo* that the taxpayers' contentions were sound and supported by the evidence.

We should like to point out here that there was no reason for the Tax Court to disbelieve the taxpayers' testimony that the houses were acquired for rental purposes because that testimony was fully corroborated.

In *Julia Robertson,* 8 T.C.M. 870, where the taxpayer sold 4 rental units in 1944 and 15 units in 1945, the Tax Court referring to the houses built for the purposes of rental said (p. 872):

> "* * * Furthermore, petitioner's testimony that such was his purpose in acquiring the properties IS CORROBORATED BY THE USE TO WHICH THE PROPERTIES WERE DEVOTED IN THE TAXABLE YEARS. * * *"

In the case at bar, the *stipulated fact* is that the 95 units were *built* for rental and were *rented* continuously for 17 months from the time of completion to 156 tenants before a single sale was made (Tr. 148, 150, 151 and 167).

Thus the testimony of the taxpayers as to their *purpose* of building and holding the 95 houses for rental and investment is *fully corroborated.*

POINTS AND AUTHORITIES.

I.

THE WORD "PRIMARILY" AS USED IN SEC. 117 (j) I.R.C. MEANS "FIRST", "CHIEF" OR "PRINCIPAL" AND DOES NOT MEAN "FUNDAMENTAL", "ESSENTIAL" OR "ULTIMATE".

Respondent contends in his brief in the *Rollingwood* case (which was served on us) (p. 7):

> "that the word 'primarily' as used in the capital gains provision of the federal taxing statute, connotes 'fundamental' or 'essential' * * *"

whereas the taxpayers contend that the word "primarily" means *"first", or "chief", or "principal",* which is what it *says.*

Respondent in his Rollingwood brief then refers to *Board of Governors v. Agnew,* 329 U.S. 441 where the Supreme Court held that the word "primarily" as used in the Bank Act of 1933 meant "essentially" or "fundamentally".

The reason for the Supreme Court's holding in that case is not difficult to understand when consideration is given to the facts and to the purpose of the statute.

In the *Agnew* case the Court was concerned with a statute providing that no employee of any corporation, etc. "*primarily* engaged in underwriting securities shall serve at the same time as director of any member bank of the Federal Reserve System, etc."

Finally, *(and this is very important)* the Court said there was *other intrinsic evidence in the Banking Act of*

1933 to support its conclusion. It referred to Section 20 outlawing affiliation of a member bank with an organization "engaged *principally*" in the underwriting business. And, the Court concluded at page 448:

> "* * * The inference seems reasonable to us that Congress by the words it chose marked a *distinction* which we should not obliterate by reading *'primarily'* to mean *'principally'*."

There is no such reason for construing the word to be found in Sec. 117 (j).

See also *U. S. v. Bennett* (C.C. 5), 186 F. 2d 407 where the Court held that the word "*primarily*" as used in Sec. 117 (j) did *not* mean "*ultimately*" as the Collector contended. The Court there said:

> "*If the statute had been intended to mean what the collector contends for, the word 'primarily' would not have been in it.* Since 'primarily' *is* in the statute, it seems clear to us that to hold, as the collector contends, that the *main,* the *first,* purpose of the keeping of these breeder cattle was for sale, *does complete violence to the statute and to its purpose and intent.*"

It is respectfully submitted that the word "*primarily*" as used in Sec. 117 (j) means "*first*", "*chief*" or "*principal*" and not anything else.

II.

RESPONDENT, HAVING TWICE FAILED TO CONVINCE THE COURTS IN OTHER CIRCUITS OF HIS VIEWS RESPECTING SEC. 117 (j) NOW MAKES A THIRD ATTEMPT IN THIS COURT.

The Respondent's narrow and restrictive views of Sec. 117 (j), which he presents here, are not new.

His attempts to establish them in the 5th and 8th Circuits have been signal failures.

As shown at pages 36 and 37 of our Opening Brief he failed in the 8th Circuit in *Albright v. U.S.*, 173 F.2d 339 (C.C. 8).

In the 5th Circuit, Respondent was again unsuccessful. *U. S. v. Bennett* (C.C. 5), 186 F. 2d 407 which follows the principle of *Delsing v. U. S.* (C.C. 5) 186 F. 2d 59; *Emerson,* 12 T.C. 875, and *Fawn Lake Ranch Co.,* 12 T.C. 1139.

Now, Respondent having been unsuccessful in the 5th and 8th Circuits, is trying for a third time, in this Circuit, to convince this Court that the word "primarily" means *not* "primarily" but " 'fundamental', 'essential' and hence 'substantial' ".

III.

THE CRUCIAL FINDING OF THE TAX COURT, IN THIS CASE IS BASED ON AN INFERENCE, DRAWN BY THE COURT FROM UNDISPUTED FACTS AND THIS COURT HAS HELD THAT IT IS AS WELL EQUIPPED TO DRAW INFERENCES AS THE TAX COURT AND IS NOT BOUND TO ACCEPT THE TAX COURT'S INFERENCES AND THAT ITS DECISIONS CALL FOR NO MORE WEIGHT THAN THEIR LOGIC SUGGESTS.

The crux of the Tax Court's decision is a purported finding of fact:

> "Shortly before August 1, 1944, McGah and O'Shea decided that San Leandro should sell houses in order to obtain capital for further construction operations and they *abandoned the purpose* of holding the houses primarily for the production of rental income. * * *"

That finding rests upon an *inference* of abandonment drawn by the Tax Court. We have shown in our Opening Brief (pages 10 and 11) that the petitioner McGah and O'Shea had read to them paragraph 12 of the Stipulation of Facts (Tr. p. 153) and each was asked what the partnership *did* with reference to the advice given by the Bank.

Each testified to substantially the same thing—*they sold some of the houses as they became vacant.*

There is no evidence in the record of any expression of *intention* on their part with respect to their *purposes* thereafter with respect to any abandonment of their house rental-investment business.

That they were in the house rental business with the 95 houses is a stipulated fact. (Tr. pp. 150-151—*Appendix*, p. iii).

The Tax Court (Tr. p. 66) in its FINDINGS OF FACT states:

> "The facts which have been stipulated are found as facts and are incorporated here by this reference."

There was no attempt made by Respondent's Counsel, on cross-examination of either of Petitioners to show any change in purpose on their part to hold the houses primarily for rental-investment.

This is not a case where the Tax Court's findings adverse to taxpayers rests on any direct evidence.

That this is true is clearly shown by the Tax Court's Opinion. Thus (Tr. 80) the Tax Court said:

> "We think that the *reasonable conclusion to be drawn from the evidence* is that San Leandro was in the *business* of selling houses in 1944. * * *"

This is purely an *inference.*

Again (Tr. 77) the Tax Court says:

> "*Upon all of the evidence* it must be *concluded* that at some time prior to August 1, 1944, the members of the partnership—San Leandro Homes Co.—*changed their alleged original purpose* with respect to the 95 houses held by the partnership *from the purpose of holding them primarily for rent, for investment purposes,* to holding them primarily for sale and selling them as they became vacant. * * *"

This again is an *inference.*

(We have shown in our Opening Brief, pp. 21-30, that the finding of abandonment is contrary both to law and

fact and that an inference of abandonment cannot be drawn *unless the facts proved reasonably beget the EXCLUSIVE inference of abandonment.*)

The law is well established that this Court may draw its own inference from the facts proven and is not bound by the Tax Court's inference and findings. *Kuhn v. Princess Lida of Thurn & Taxis* (C.C. 3, 119 F. 2d 704, 705.

This Court has affirmed the principle of the *Kuhn* case, supra, in two recent decisions:

In *Pacific Portland Cement Company v. Food Machinery and Chemical Corporation* (CC 9, re-hearing denied January 6, 1950, 178 Fed. 2d 541, 548) an action for declaratory relief and for money paid to the defendant under protest, the Court said:

> "* * * The Supreme Court has told us that, 'A finding is "clearly erroneous" when although there is evidence to support it, *the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co.,* 1948, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746.
>
> "As a corollary to this rule, *we may make our own inferences from undisputed facts or purely documentary evidence.* For, to use the colorful language of the Court of Appeals for the Third Circuit, *the rule does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.' Kuhn v. Princess Lida of*

Thurn & Taxis, 3 Cir., 1941, 119 F. 2d 704, 705. And see *Western Union Tel. Co. v. Bromberg,* 9 Cir., 1944, 143 F. 2d 288, 290; *Home Indemnity Co. v. Standard Accident Ins. Co.,* 9 Cir., 1948, 167 F. 2d 919, 922, 923.''

This Court, in a very recent case, decided November 17, 1950, *Gailbreath v. Homestead Fire Ins. Co.,* (CC 9) 185 F. 2d 361, 364, states this rule.

This Court again reaffirmed the rule of the *Kuhn* case, supra, in *Gillette's Estate, et al. v. Commissioner* (CC 9) 182 F. 2d 1010, 1013, 1014. The case was submitted on stipulated facts and oral evidence put on solely by petitioner. The Court said (p. 1013):

> ''* * * The error complained of was asserted to exist *in inferences or conclusions drawn by the* Tax Court therefrom. In such circumstances it has been said in cases appealed from District Courts that within certain limits we are free, that is, that we have the *power* (and we would suppose the *duty*) to draw such inferences and conclusions as we deem proper. * * *
>
> ''It is commonly stated, and properly so, that due respect should be given to the Tax Court's expertness in tax matters. *While in most circumstances such respect would weigh heavily, we are not impressed by it here where the ultimate inference of fact must be as to what the decedent contemplated as the driving reason for his actions regarding his property.* In this duty, which does not bring technical tax questions into play, it is in no way derogatory to the Tax Court to say that *United States Courts of Appeals are as*

well equipped to draw inferences as is the Tax Court and for that reason the Tax Court decisions call for little more weight than its logic suggests."

The same rule has been enunciated in various of the other Circuits, as for example: *Stubbs v. Fulton Nat. Bank,* (CC 5) 146 F. 2d 558; *U. S. v. So. Georgia Ry. Co.* (CC 5) 107 F. 2d 3; *Murray v. Noblesville Milling Co.* (CC 7) 131 F. 2d 470; *McManus Est. v. Comm.* (CC 6) 172 F. 2d 697.

This Court thus has full power and authority to consider the correctness or error that resides in the *Tax* Court's *inference* on the basis of which it predicates its finding of an abandonment of the *primary* rental and investment purpose.

In its opinion, the Tax Court shows clearly that the *purpose* to hold the 95 houses for rental-investment *clearly existed.* Thus (Tr. 78) it says:

> "* * * The question becomes concerned with whether *an original purpose of* holding property *changed,* and if so, when."

Surely, a non-existent purpose could not have changed.

In its *opinion* (Tr. p. 81) the Tax Court says:

> "In the instant proceeding, we are unable to conclude that the petitioners have proved that San Leandro was holding 95 houses in 1944, prior to the sale of the 14 houses, primarily for investment purposes. * * *"

In this connection we ask this Court to look again at the SUMMARY OF THE CRITICAL FACTS set forth in our Opening Brief pp. 15-18—based primarily on stipulated facts and documents and ask, as we have asked before: HOW COULD THE TAXPAYERS (as found by the Tax Court) HAVE *ABANDONED* THEIR PURPOSE OF HOLDING THE 95 HOUSES PRIMARILY FOR RENTAL-INVESTMENT IF THEY NEVER *HAD* THE PURPOSE TO BEGIN WITH?

Respondent in his Brief (p. 16) being hard put to sustain this purported finding of an abandonment, evolves an idea, which, to say the least, is *unique,* in connection with an abandonment. *We refer to the concept of a "partial"* (?) abandonment.

Respondent says that the Tax Court did not "find or hold that they had ENTIRELY abandoned their *rental business.*"

We have never claimed that the Tax Court found that Petitioners ever abandoned their *"rental business"*. THE EXISTENCE OF THAT BUSINESS IS A STIPULATED FACT (Tr. p. 150, par. (f) and EXHIBIT 3 attached to the Stipulation (Tr. 173).) Such a finding would have been contrary to the stipulated fact.

But the Tax Court *did* find, as we pointed out, that the taxpayers ABANDONED THEIR PURPOSE of holding the houses primarily to produce rental income.

We have pointed out in our Opening Brief, page 24, that THERE IS NO SUCH THING AS A CONDI-

TIONAL OR PARTIAL ABANDONMENT. An abandonment "*must be all in all or not at all*". (*Trevaskis v. Peard,* 111 Cal. 599, 605)

The inference of alleged *abandonment of purpose* cannot be drawn because the facts do not reasonably beget the EXCLUSIVE inference of abandonment. (1 *C.J.S.* p. 15, Sec. 7c; *Foulke v. N.Y. Consol. R. Co.,* 228 N.Y. 269, 127 N.E. 237, 238; *Columbus & G. Ry. Co. v. Dunn,* 185 So. 583, 586.

IV.

A LONG LIST OF TAX COURT DECISIONS HOLDS THAT THE NUMBER AND FREQUENCY OF SALES OF ITEMS OF PROPERTY USED IN THE TAXPAYER'S RENTAL BUSINESS DOES NOT PUT HIM IN THE SELLING BUSINESS SO AS TO DEPRIVE HIM OF THE BENEFITS OF SEC. 117 (j).

At pages 39 to 51 of our Opening Brief we have cited and quoted from a series of recent Tax Court decisions which clearly establish the proposition that the number and frequency of sales of property used in taxpayer's rental business does not cause that property to become property held primarily for sale to customers in the ordinary course of business.

To point out distinctions without differences in these cases, as Respondent attempts to do, is sheer futility.

We again refer the Court to these cases and their clear disposition of the problem under Sec. 117 (j).

We are well aware of the cases in this Circuit, cited by Respondent, and holding that the number and frequency of sales put the seller into the business of selling so that his property *did not qualify as a capital asset* and hence did not qualify for capital gains.

But, when the owner sells property used in his trade or business of *renting* the property, which he has held primarily for rental-investment purposes and not primarily for sale to customers,—the cases hold with singular unanimity that his sales do not disqualify him from the relief provided by Sec. 117 (j).

His *rented* property was not a capital asset to begin with *(I.R.C.* Sec. 117 (1) (B)) and does not become such by the number and frequency of sales thereof.

The Congress has not said that the relief intended by Sec. 117 (j) is to be denied if some unstated number of sales of property used in trade or business and held primarily for rental and investment is sold.

CONCLUSION.

In this case the crucial finding of the Tax Court is a finding *based on an inference* (from evidence which is not in dispute) that the taxpayers *abandoned* their purpose of holding the 95 houses *primarily* for rental and investment.

Section 117(j) of the Internal Revenue Code is a *relief measure.* The Respondent has been twice unsuc-

cessful in other Circuits in his effort to narrow and restrict its meaning so as to deny *relief* where relief was due.

Having been unsuccessful in the 8th and 5th Circuits to convince the Court that it should deny relief on the basis of his views with respect to an alleged narrow and and restricted meaning to be given to Section 117 (j), he now makes his third attempt in this Court.

We respectfully submit, since this Court is entitled to draw its own inference from the undisputed facts, that a mistake has been committed by the Tax Court in its conclusion which it says it drew from the entire evidence, in its *conclusion* or *inference* that the taxpayers *intended* to and *did* abandon their primary purpose of holding the property for rental and investment.

The record contains the direct testimony of the taxpayers that they intended a rental venture with all of the houses from the very beginning; that they sold the block of 74 houses comprising a contiguous unit which included the 69 $39.99 monthly rental units *only* when they found out that the promised substitution of $50.00 rental priorities were not obtainable, inasmuch as they knew that these houses, all of which were built at the same cost per unit, could not be profitably rented at $39.99 a month. Their testimony as to their intent to rent the 95 houses if *fully corroborated* by the fact of rental for the period of 17 months prior to the time that a single house was sold.

It is respectfully submitted that this Court should draw its *own* inference from the undisputed facts that there was *no* abandonment of taxapyers' purpose to hold the 95 units for rental-investment and that the Tax Court's finding and decision is clearly erroneous.

Dated, Oakland, California,
April 18, 1951.

M. W. Dobrzensky,
Edward B. Kelly,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix.

Appendix

The Tax Court found (Tr. 68):

"Originally, in August of 1942, McGah and O'Shea contemplated renting all of the houses, provided all could be rented at the rate of $50 per month rent. They applied to O.P.M. (Office of Production Management) for allocation of housing units to be built under preference ratings on materials which could be rented for $50 per month, but they were told by the officials in charge that some of the houses would have to be made available at a monthly rental of $39.99, and they agreed, therefore, that 69 units *would be made available* at that rental, and 100 units would be made available at a monthly rental of $50; and the approval of the application for preference ratings was given upon that understanding; and it was set forth in the application. *However, there was an oral understanding with officials that this allocation might be changed if and when other directives and allowances were made officially, so that McGah and O'Shea had some hope that eventually, all of the 169 units could be rented for $50 per month.*"

Next the Tax Court *found* that the taxpayers *knew that they could not rent houses profitably for $39.99 per month* (Tr. 69):

"* * * They knew, also, in the beginning, that the carrying or financial charges for the interest and mortgage payments would amount to about $33 per month for each house; that maintenance charges and other expenses would amount to around six or seven dollars per month for each house; *and that, consequently, it would not be profitable to rent houses for $39.99 per month. They considered that the monthly rental would have to be $50 per month if San Leandro were to profitably hold the houses for rental.*"

What they did and *why* they did is now clearly shown by the findings (Tr. 69-70):

"As the houses were nearing completion, McGah *called upon officials in F.H.A. to request their approval of charging more than $39.99 for the 69 houses which it had been specified should be made available at that rental, but the request was denied.* At that time McGah learned that San Leandro was not restricted in any respect in the matter of its electing to sell the houses rather than to rent them; that San Leandro was privileged to sell any of the houses it desired, and could sell all of them.

"*There was an active market for houses, and there would have been no problem in selling them.*

"*When McGah and O'Shea learned at the end of 1942, or in the beginning of 1943, that they could not get more than $39.99 rental for 69 of the houses, they decided then to sell a group of 74 houses which, by location, made a group.* San Leandro sold 74 houses during its first fiscal year which ended October 31, 1943, without ever letting them be rented, including the 69 which could have been rented for only $39.99 per month. The net profit from these sales was $82,-691.20. The 'realized profit' upon an installment sales method of reporting the gain was $53,820.13, and that amount was reported as ordinary income for the fiscal year ending in 1943.

"San Leandro, *from and after March 15, 1943, rented the remaining 95 houses,* but did not take leases on any of them. Rather, *they were rented on oral month-to-month tenancies to defense workers for $50 rental per month. San Leandro maintained a rental office and paid an agent $10 for each house rented. From March 15, 1943, until August 14, 1944, the 95 houses were occupied by 156 different tenants.*"

That they were in the house rental business with the 95 houses is a stipulated fact (Tr. pp. 150-151):

"(e) The remainder of said 169 houses, viz., 95 houses were rented by said partnership from and after on or about April 1, 1943, to persons engaged in National Defense activities. *From March 15, 1943, until August 14, 1944, said 95 houses were rented to 156 different tenants.*

"(f) The rental of said 95 houses was carried on by the partnership from an office of said partnership maintained for that purpose located at No. 1411 Davis Street, San Leandro, California. The houses were let on oral month-to-month tenancies at $50.00 per month. A commission of $10.00 per house was paid to an agent for renting. The rental operations were conducted by a lady employed for that purpose at the partnership's aforesaid office. She looked after all rental matters, including any complaints, collections and the like. Annexed hereto, made a part hereof, all with the same force and effect as if set out at length herein, and marked Exhibit '3,' is a statement of the receipts and disbursements of said partnership from said rental operation as shown by the partnership books, for the fiscal years of the partnership commencing October 31, 1944, and ending on the 31st day of October, 1949. * * *"

*　　*　　*　　*　　*　　*

"(h) Each of the 95 houses, sold as aforesaid, until it was sold, *had been rented continuously by the partnership from on or about the time the construction of said house was completed.*

"(i) Each of said 95 rented dwelling houses sold by said partnership, subsequent to April 1, 1943, was owned and held by said partnership for at least six (6) months prior to the sale thereof and *prior to such sale and during the six months' period had been rented continuously by the partnership, as aforesaid.*"

No. 12751

United States Court of Appeals

For the Ninth Circuit

MAKAH INDIAN TRIBE, a Corporation, CHARLES E. PETERSON, DAVID C. PARKER, KENNETH WARD, JOHN H. IDES *and* CLIFFORD JOHNSON, Individually and as Members of the COUNCIL OF THE MAKAH INDIAN TRIBE, *Appellants,*

— vs. —

MILO MOORE, Director of the Department of Fisheries, State of Washington, *Respondent.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

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APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

This action by the Makah Indian Tribe, a federal corporation chartered under the laws of the United States as the governing body of the Makah Tribe of Indians, and five individuals, the members of the Council of said Tribe, against the defendant, the Director of the Department of Fisheries of the State of Washington, was brought to obtain an injunction enjoining the defendant or his representatives, agents and employees from enforcing against the Makah Indians certain rules and regulations promulgated by the defendant concerning fishing in a certain stream

known as the Hoko River, on the ground that the application of said rules and regulations to the members of the Makah Tribe fishing in the Hoko River was violative of the treaty entered into in 1855 between the Makah Tribe of Indians and the United States of America. The complaint is at pages 3 to 13 of the transcript. The answer admits the organization and status of the plaintiffs and defendant and denies that the enforcement of said regulations is violative of the treaty (R. 14-17).

The treaty concerned which is set out in full in Appendix B hereto, was entered into between the Makah Tribe of Indians and the United States of America on January 31, 1855, and may be found at 12 Stat. at L. 939. By the terms of said treaty the Makah Indians ceded to the United States of America their claim to the lands they then occupied excepting a small portion thereof which was set aside as a reservation. The portion of said treaty around which this claim arises is contained in Article IV and particularly in the following words thereof:

> "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all persons of the United States."

The jurisdiction of the district court is contained in Section 1331 of Title 28 U.S.C.A., which provides as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and costs *and arises under*

> *the constitution, laws or treaties of the United States.*" (Emphasis supplied)

After trial on the merits the trial court made and entered its order dismissing the plaintiffs' complaint (R. 42, 43). The appellants gave due notice of appeal and filed their cost bond (R. 43, 44, 45). The jurisdiction of this court exists by virtue of Section 1291 of Title 28 U.S.C.A., which provides in part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. * * *."

STATEMENT OF THE CASE

The following facts were admitted by the pleadings: The Makah Indian Tribe is a federal corporation with its headquarters at Neah Bay, Washington, and is a recognized and existing Indian organization of which the governing body is a Tribal Council consisting of five members who were the individual plaintiffs in this case. This action was brought by the Tribe and by the individual plaintiffs as a class action for and on behalf of all the members of the Makah Tribe of Indians. The Makah Indians and the United States of America entered into a treaty on or about the 31st day of January, 1855, by the terms of which the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations was further secured to the Makah Indians in common with all persons of the United States. The defendant did and would, unless enjoined by the court, apply to the members of the Makah Tribe the laws of the State of Washington pertaining to fishing, the same being

the laws of Washington 1943, chapter 181, section 1, page 571 (Rem. Rev. Stat. 1943 Supp., Section 5717 -1) and the regulations of the defendant issued pursuant thereto, the same being General Orders Nos. 189 and 190 (Pls.' Ex. 7). It was denied that the application of said laws and regulations impinged upon the treaty rights of the Makah Indians.

The Makah Indians were and are so-called "fish Indians." At the time of the treaty they lived in houses made of big split cedars (R. 113, 114). Several families would live in each of these houses. They had regular benches above the sleeping places all the width and length of the house. Upon these benches they kept baskets where they stored cured fish for use during the winter months. Each family had its own place and each basket was marked for the winter month in which it was to be used. Each family would use two or three baskets a month (R. 114).

The Hoko River was a fall fishing river where the Makahs went in August or September (R. 112, 113) and would fill those baskets which were still empty. These salmon, which are also known as silvers, were largely called "fall salmon" (R. 112). In the other streams they caught what was called spring or Chinook salmon earlier in the year.

Such was the situation when the treaty party came to Neah Bay to negotiate with the Makahs. Article I of the Treaty provides that the Makah Indians cede all rights to the lands in country occupied by that Tribe bounded by the Oke-Ho River on the Straits of Fuca and the Pacific Ocean. The so-called

Oke-Ho River also then called the Hoke-ho is now called the Hoko River.

When Governor Stevens called the conference aboard his schooner and explained to the Indians the purport of the proposed treaty, Kal-Chote of Neah Bay spoke as follows:

> "He thought he ought to have the right to fish and take whales and get food where he liked. He was afraid if he could not take halibut where he wanted he would become poor." (Pls.' Ex. 8, p. 19)

Keh-Chook of the stone house (Tatoosh Island) followed and said:

> "What Kal-Chote had said was his wish. His country extended up to Hoke-Ho. He did not want to leave the salt water."

The Governor's reply:

> "Governor Stevens informed them that so far from wishing to stop their fisheries he intended to send them oil, kettles and fishing apparatus." (Pls.' Ex. 8, p. 19)

It is significant that these minutes (Pls.' Ex. 8) were prepared by the white men themselves. [That part of Ex. 8 specifically pertaining to the Makah Treaty is set out in the appendix.]

Klah-Pe-At-Hoo of Neah Bay said:

> "* * * He was willing to sell his land; all he wanted was the right of fishing." (Pls.' Ex. 8, p. 20)

It-An-Daha said, in part:

> "I shall submit all my difficulties to him (meaning the Great White Father); my wish is like

> the rest; I do not wish to leave the salt water. I want to fish in common with the whites." (Pls.' Ex. 8, p. 20)

There was some objection to giving up their homes to move on the proposed reservation and Governor Stevens asked—

> "Whether if the right of drying fish wherever they pleased was left them, they could not agree to living at one place for a winter residence, * * *." (Pls.' Ex. 8, p. 20)

The following day, upon the group being reassembled, Governor Stevens spoke to the assembly chiefs again and said, in part, as follows:

> "He (meaning the Great White Father) will send you barrels in which to put your oil, kettles to fry it out, *lines and implements to fish with.*" (Emphasis supplied)

The Indians were then generally agreed and, as per the words of Kal Chote:

> "What you have said was good and what you have written is good." (Pls.' Ex. 8, p. 21)

The treaty was then executed (Pls.' Ex. 8, p. 21).

The minutes reflect what was told to other tribes at or about the same time and, inasmuch as it is apparent that not all of the words used were recorded in these minutes, it is only logical to assume that the words, phrases and promises used to one tribe were equally used to another. In such a setting we quote from certain portions of the minutes of the negotiations with other tribes at or about the same time. In dealing with the Skokomish Indians there was considerable difficulty because the Indians desired to re-

tain half of their lands. In reply to this position the minutes show this:

> "Mr. Simmons, the agent, explained that if they kept half their country they would have to live on it and would not be allowed to go anywhere else they pleased. That when a small tract alone was left the privilege was given of going wherever else they pleased to fish and work for the whites." (Pls.' Ex. 8, p. 16)

One of the other chiefs sided with Governor Stevens and said:

> "My heart is good (I am happy) since I have heard of the paper read, and since I have understood Governor Stevens, particularly, since I have been told that I could look for food where I pleased and not in one place only. * * *. We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get salmon, and when done fishing will return to our houses. I am glad to acknowledge you and the Great Father as our Father." (Pls.' Ex. 8, p. 16)

Governor Stevens replied:

> "This paper secures your fish. Does not a father give food to his children? Besides fish you can hunt, gather roots and berries." (Pls.' Ex. 8, p. 17)

As explained by the witness, Perry Ides, at the time of the treaty there was no written language of the Makahs and everything has been passed down verbally. All knowledge and learning has been transmitted that way (R. 126). At the time of the treaty the Makahs did not have anyone who was educated enough to interpret to them the wording of the treaty.

That was the reason it was necessary to explain it to them in terms of something they could "see" so they could retain it in their minds (R. 128). Mr. Ides says that is the explanation for the words of the witness Claplanhoo who said (speaking to the assemblage in the court room in his native tongue):

> "* * *. It was my grandfather that received the treaty rights in 1863. They gave them in that treaty the right that we have, the right to fish in the Hoko River, and it was worded that they could fish there *as long as the tide came in and out again.* That meant that it was continuous. He was told our white friends would help us to continue the good will that the one who made the treaty had at that time for the Makah Tribe * * *." (R. 118, Emphasis supplied)

The Hoko River is about ten miles from the present boundary of the Makah reservation (R. 53). It is a small stream anywhere from twenty to fifty feet wide (R. 285).

Several of the older members of the Tribe testified as to their experience at the Hoko as children and the facts that had been related to them by their fathers and grandfathers concerning fishing there.

In ancient times the Makahs took fish from the Hoko by several means. They used spears and traps (R. 112, 122, 132, 149, 151, 152, 161). They made rope from whale sinew (R. 122, 132), and also from spruce roots and thistle bark (R. 151, 152). With this rope and with sticks they made mats and from them constructed traps on the same principle as modern fish traps (R. 112, 149, 161). Another form of

trap was to put a large log across the stream so the fish would have to jump over it and then put brush in the up-river side and the fish would get caught in the brush (R. 161). When they had caught all the fish they wanted they took the brush out and let the rest of the fish go on upstream. With rope, made from whale sinew, spruce roots or thistle bark, they made dip nets as much as eight feet wide, which they carried between two canoes (R. 122, 152). They also made gill nets just like gill nets that are used today from this whale sinew (R. 132). Plaintiff's Exhibit 9 is a large harpoon rope made from this whale sinew and demonstrates the Makah's ability to make rope from this material. As early as 1893 at least the Indians were using seines and drift nets which they obtained from the white men (R. 155). At least as early as 1900 the Indians were using gill nets in the Hoko and were selling the fish so caught to a cannery tender (R. 156). They were using drag seines at least by 1907 at the Hoko (R. 132).

Since about 1933 (R. 70) the defendant and his predecessors have, by arresting or threatening to arrest (Pls.' Ex. 6) and by confiscating or threatening to confiscate fishing gear, prevented the Makahs from taking fish from the Hoko river. (The right of "sport fishing," which is allowed, is impractical as shown more in detail hereafter.)

The applicable statute of the State of Washington empowers the defendant to promulgate rules and regulations concerning the taking of fish. Section 5717-1 Rem. Rev. Stat., '43 Supp.; Laws of Washington '43,

ch. 181, Sec. 1, p. 571. That act was merely amendatory of substantial equivalent laws theretofore in existence, Sec. 10868 Rem. Rev. Stat.; Laws of Washington 1929, p. 59; Sec. 10867-1 Rem. Rev. Stat.; Laws of Washington '29, p. 209. The applicable regulations are general orders Nos. 189 and 190 of the Director of Fisheries of the State of Washington promulgated on the 21st day of April, 1947. These regulations were likewise amendatory of somewhat equivalent regulations in prior existence. The regulations were introduced in evidence as plaintiff's (Ex. 7, R. 109, 209).

By regulation No. 4 of Order 189, it is made unlawful to fish at any place, at any time and in any manner and with any gear except as provided for in the Orders of the Director (Pls.' Ex. 7, R. 214, 215, 220).

Under said regulations the only fishing that is permitted in the Hoko River by the Makah Indians or any other person is so-called "sport fishing." The only gear permitted under sport fishing is one pole and one line and one hook per fisherman. There are strict limitations on the catch and none of the fish so caught may be bartered, sold, traded or exchanged (Pls.' Ex. 7, R. 220).

There was some conflict in the evidence as to whether or not fall salmon could be caught in the Hoko River by hook and line. The plaintiff's witnesses testified that they could not (R. 162, 175, 176, 207, 200). The State's witnesses testified that it was possible (R. 295, 312) but they admitted that such fish do not eat after entering the fresh water (R. 251). The

trial court indicated without specifically finding that they were unable to catch the fish by hook and line in the Hoko River (R. 31). At least even if possible, the Makah's do not find that it is a sufficiently worthwhile endeavor to be engaged in because they do not fish in the Hoko with hook and line (R. 176, 206, 207).

The defendant produced several expert witnesses who testified that in their opinion these regulations were necessary to the preservation of the fish run. These opinions, however, as shown by the testimony of the same witnesses, are based upon a particular plan or scheme conceived by the Department of Fisheries. The chief enforcement officer of the Department testified that the Department had only one enforcement officer in the Hoko area and that his area extended from Lake Quinault on the coast around Clallam and Jefferson Counties and around to Shelton on the lower end of Hood Canal or closer to the lower end of Hood Canal (R. 284, 289) and that it was utterly impossible for one man to do an efficient job of policing the area during the Fall season (R. 290). This is in spite of a biennial appropriation for the years 1947-49 of $2,220,000.00 (R. 246).

No actual count has ever been made by the Department of the silver run in the Hoko River by the means used in other areas (R. 249, 258). The chief biologist of the Department testified upon direct examination that they had a stream survey made by the then Director in 1932 and that report showed a "fairly large silver run" (R. 317) and that there has been "some" decrease since then (R. 318) but

that he would "hesitate to say that the River is capable of producing a larger silver run than is now in it" (R. 318). He then, upon cross-examination, conceded that it was possible to make a regulation by which some fishery could be permitted in the Hoko River without endangering the run and that the only obstacle to such regulation was the question of enforcement (R. 324, 325). The former Acting Director and now Supervisor of Hatcheries of the Department testified that in his estimation an escapement of between 4,000 and 5,000 fish per year would preserve the silver salmon run in the Hoko (R. 263).

Under the Department's regulations gill-net fishing has been made lawful in the Quinault, the Queets, Quillaute and the Hoh Rivers which are, like the Hoko, essentially creeks (R. 210). There is also gill-net fishing in the Skagit (R. 211) which, of course, is a larger river (R. 211).

The regulations which the Department has are applicable to all persons alike, whether treaty Indians or otherwise (R. 225, 226) and there is no contemplation of any change in that policy (R. 227).

The Department believes that when the salmon run is in the deep salt water the runs for the various streams are commingled and hence it prefers to limit fishing to those waters because it feels that the chances of taking too large a share of the run of fish from any one river is lessened (R. 310). This, of course, is the reason for the general rule provided by Section 28 of the regulations prohibiting all fishing within three miles of the mouth of any river entering into Puget Sound. This, of course, simplifies the

State's enforcement problem. Furthermore the State permits purse seining at the mouth of the Puget Sound. The catch of silver salmon by the purse seine fleet is enormous. The real danger is that this catch, combined with the troll catch and other allowable commercial fishery might deplete the run (R. 323).

The fish in the deep salt water are caught primarily by trollers but also by purse seiners and gill-netters (R. 169-170). There are in the vicinity of one-thousand trolling boats operating out of, and selling their fish in, the Neah Bay area (R. 169). Of these boats, five or six are owned or operated by Makah Indians (R. 173). There are also 25 or 30 Makah Indians who fish sporadically in the reservation area in the sound from canoes or small outboard motor powered row boats (R. 95). The Makahs also fish in the two streams on the reservation by gill-nets (R. 197-198). By all of these means the Makahs market between six and seven percent of all fish sold to the Fishermen's Cooperative Association and the Bay Fish Company which purchase fish in the Neah Bay or reservation area (R. 193).

Fishing is still an important and indispensable part of the economy of the Makah people. There are on the reservation 105 families with a total population of approximately 462 (R. 78). As shown by the minutes, Pls.' Ex. 8, p. 3, the estimate at the time of the treaty was a population of 585. Income from wages, earned chiefly in the logging industry, is the only item exceeding that of fishing (R. 74). The logging on the reservation, which provides this employment, is to be finished by 1955 (R. 79). All Mak-

ahs fish (R. 74), but only about 20% of the adults fish commercially (R. 75).

At the conclusion of the trial the court announced certain tentative conclusions, only a part of which has been reported (R. 336-337). Several months later, after written briefs had been submitted, the court announced his oral opinion (R. 19-32) departing from the indications announced at the conclusion of the trial, denying the plaintiffs' petition in toto. Before findings of fact and conclusions of law were entered the Honorable Judge who heard the case, the late Lloyd L. Black, died. Thereafter judgment of dismissal was entered on the oral opinion by the Honorable Peirson M. Hall. From that judgment this appeal is prosecuted.

SPECIFICATION OF ERRORS

The court erred:

(1) In holding that to permit the plaintiffs to take fish from the Hoko in their usual and accustomed manner would be to deprive the whites of the right to fish in common and hence the prohibition was impliedly agreed to in the treaty (R. 30).

(2) In holding that to permit a limited fishery by the plaintiffs would be to permit extermination of the salmon (R. 30).

(3) In holding that the present regulations are necessary for the conservation of salmon life in the Hoko River.

(4) In holding that because the regulations applied equally to all persons and there was no discrimination against the Indians and that they were reasonable, fair and requisite they did not conflict with rights guaranteed by the treaty (R. 31).

(5) In holding that the plaintiffs are asking the abolition of all regulation (R. 29 and 291).

(6) In denying the injunction and dismissing the proceeding (R. 32).

SUMMARY OF THE ARGUMENT

Since the Hoko River was, at the time the Makah Indians signed a treaty with the United States government, a "usual and accustomed fishing ground and station" of the said Makahs and the right of the Makah Indians to fish at their usual and accustomed fishing grounds and stations in common with all persons was further secured by said treaty, the State of

Washington, although it may regulate the right of Makahs to fish in said Hoko River, can not impose, by way of regulation, total or substantially total prohibition upon said right.

ARGUMENT

I.

The Treaty Guaranteed the Makahs Their Continued Right to Fish at Their Usual and Accustomed Stations.

The treaty with the Makahs contained the following provision with reference to their right to fish:

> "Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with privileges of hunting and gathering roots and berries on open and unclaimed lands: provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens."

The treaty is set out in full in Appendix B to this brief.

II.

The Hoko River Was a "Usual and Accustomed Fishing Ground and Station" of the Makah Indians at the Time the Makah Treaty Was Signed.

It was practically conceded by the defendant that the Hoko River was a fishing ground and station of the Makah Indians at the time of the signing of the treaty. The oldest witnesses available testified that throughout their lifetimes they had migrated to the banks of the Hoko in the fall to fish for salmon and

that there were then smoke houses and traps in the river (R. 111, 112, 122, 149, 155, 161), and one witness testified that according to legend the Makahs had fished in the Hoko River for generations and generations (R. 113) and that his grandfather was at the party that received the treaty rights and that in that treaty they understood they had the right to fish in the Hoko River as long as the tide came in and out again (R. 118).

III.

The Right "Further Secured" to the Makahs to Fish in the Hoko Was and Is an Important One.

(a) The importance at the time of the treaty:

There can be little question of the importance to the Makahs of their rights to fish in the Hoko at the time of the treaty. Their claim to the Hoko was recognized in the treay itself which describes their boundaries as being from the Hoko to the Coast (App. B). The minutes reflect that almost the sole concern of the Makahs in executing the treaty was that their right to maintain their livelihood from fish should be secured to them regardless of their conveyance of their interest in the lands (Pls.' Ex. 8, pp. 19, 20, 21). This was tersely stated by Klah-Pe-At-Hoo of Neah Bay as follows:

> "He was willing to sell his land; all he wanted was the right to fish." (Pls.' Ex. 8, p. 20)

The fact that the Hoko was a fall river heightened its importance. During the spring and summer months the Makahs cured the fish they caught and stored them in baskets to carry them through the win-

ter (R. 113, 114). In the fall of the year after other fishing was done they filled the remaining empty baskets from the Hoko (R. 112, 113). Thus the Hoko was in fact their insurance against a hungry winter.

(b) The importance today:

As can readily be ascertained from the map (Pls.' Ex. 1) the Makah reservation at Neah Bay is located in an isolated and unpopulated area. The nearest community of any size is Port Angeles some eighty miles away. The two chief items of present income of the Makahs are wages and fishing (R. 74). The chief source of wages now is the logging on the reservation which by contract is to be finished by 1955 (R. 79). Only five or six Makahs own regular commercial fishing boats (R. 173) which are competing with approximately one thousand commercial trolling vessels (R. 169) and untold numbers of purse seine boats (R. 323). Twenty-five or thirty Makahs fish in the reservation area in the Sound from canoes or small boats powered by outboard motors (R. 75). Some Makahs fish with gill nets in the two streams on the reservation (R. 197, 198). From all these sources Makahs market between six and seven per cent of all fish purchased by buyers in the Neah Bay area (R. 193). There are on the reservation now approximately 462 Makahs (R. 78) compared with an estimated population of 585 at the time of the treaty (Pls.' Ex. 8, p. 3). The right or ability of the Makahs to take another important food fish, that is the halibut, has also been serious curtailed by the United States Government (R. 70, 71, 72). It is thus apparent that

the fall salmon run of the Hoko River is as important, or possibly more important, to the Makah Indians now than it was at the time of the treaty.

IV.

A Liberal Interpretation Is to Be Given Rights Secured by Treaty and an Especially Liberal Construction Must Always Be Applied in Favor of the Rights Guaranteed to Indians in Treaties.

Tulee v. Washington, 315 U.S. 681, 86 L. ed. 1115;

Seufert Bros. Company v. U. S., 249 U.S. 194, 63 L. ed. 555;

Winters v. U. S., 207 U.S. 564, 52 L. ed. 340;

U. S. v. Kagama, 118 U.S. 375, 30 L. ed. 228;

Nielsen v. Johnson, 279 U.S. 47, 73 L. ed. 607;

Worcester v. Georgia, 31 U.S. 515, 8 L. ed. 483.

In *Nielsen v. Johnson*, 279 U.S. 47, 73 L. ed. 607, 610, speaking generally of rights granted by treaty, the court said:

> "Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U.S. 123; *Geofroy v. Riggs*, 133 U.S. 258, 271; *In re Ross*, 140 U.S. 453, 475; *Tucker v. Alexandroff*, 183 U.S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U.S. 332; *Tucker v. Alexandroff*,

supra; Geofroy v. Riggs, supra, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments."

In *Worcester v. Georgia,* 31 U.S. 515, 8 L. ed. 483, 508, Justice McLean concurring said:

> "The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unletered people rather than their critical meaning should form the rule of construction."

In *Winters v. U.S.,* 207 U.S. 564, 52 L. ed. 340, 346, the court said:

> "* * * Ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relation to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might sometime be urged against them. * * *."

In *Tulee v. Washington,* 315 U.S. 681, 86 L. ed. 1115, 1120, the court referring to this very treaty provision said:

> "From the report set out in the record before

us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of the tribe. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

V.

Assuming that the Defendant Had the Right to Regulate Fishing by the Makah Indians in the Hoko River, Regulations Such as Those Enforced There by this Defendant, Which Amount to a Total or Substantially Total Prohibition of All Fishing by the Makahs in the Hoko River, Contravene the Rights Guaranteed by the Treaty.

(a) The defendant's regulations amount to a substantially total prohibition of all fishing by the Makahs in the Hoko River.

The regulations promulgated by the defendant were introduced into evidence as Plaintiff's Exhibit 7. By Section 4 all fishing is made unlawful by the regulations save that thereafter made lawful. By Section 28 of that order the only lawful fishing within three miles of the mouth of any stream entering into Puget Sound is the so-called sport fishing or hook and line fishing.

Such fishing has proved impractical, if not impossible.

There was a conflict in the testimony as to whether or not silver salmon could be caught by this means, the plaintiffs' witnesses testifying that they could not be so caught and they had tried. The defendant's witnesses testified that they could be so caught although they did not testify as to personal experience in the Hoko. The defendant's witnesses, however, admitted that the salmon did not eat after entering the fresh water, being impelled thereafter solely by the spawning instinct. If there is any possibility of catching them by this means it is so difficult and remote that it is valueless as shown by the undisputed evidence that the Makahs do not fish by this means in the Hoko. To limit the manner or method of catching fish to one that is so impracticable amounts to a total or substantially total prohibition.

(b) Such a prohibition contravenes the rights guaranteed by the treaty.

Tulee v. Washington, 315 U.S. 681, 86 L. ed. 1115;

United States v. Winans, 198 U.S. 371, 49 L. ed. 1089;

McCauley v. Makah Tribe, etc., 128 F.(2d) 867.

The foregoing three cases all involved treaty provisions practically identical to that with which we are here concerned. The latter case concerned this very tribe and this very provision and in fact, as stated by the trial judge, this action is in effect a successor to that one. In that case, which the trial court heard solely on the pleadings, a decree was en-

tered totally enjoining the defendant's predecessor from interfering in *any* manner with the right of the Makah Indians to fish in the Hoko River. This court reversed on the apparent ground that the decree was too broad. As stated by this court:

> "The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens." (128 F.(2d) 870)

As the court pointed out, neither position was tenable after the *Tulee* decision which had come down from the Supreme Court after the trial court had entered its decree and before this court rendered its decision. Such positions were clearly untenable because the Supreme Court in the *Tulee* case had said as follows:

> "It (meaning the State) argues that the treaty should not be construed as an impairment of this right (meaning its right to regulate fishing) and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places' free from State regulation of any kind. We think the State's construction of the treaty is too narrow and the appellant's too broad; * * *."

Although this court invited further proceedings in the *McCauley* case, because of the intercession of the war and other factors not of record, further proceedings were not instituted until the commencement of this action.

This action was then instituted to determine the

answer to the following question: Assuming that the Makah Indians do not have by virtue of the treaty an "unrestricted right to fish," and further assuming that the State's right to regulate fishing is impaired by the treaty, is a regulation which substantially or totally prohibits fishing by the Makah Indians in the Hoko River violative of the treaty guarantee?

The net result of the present regulations is that the Makahs are placed in identically the same position as persons not having any treaty rights and, indeed, in the identically same position as if they had no treaty at all. This was conceded by the defendant director and he made the bland assertion that he proposed no change in that policy of treating all persons alike (R. 226, 227). In such a setting the words of the Supreme Court in *United States v. Winans*, 198 U.S. 371, 49 L. ed. 1089, 1092, in construing an identical provision of the treaty with the Yakimas sound a clear warning. The court said:

> "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more."

As to depriving the Indians of the right to fish the court in that case further said at page 1092:

> "The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment and which

were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which these rights had to be accommodated. *Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a granting of rights to them but a grant of right from them—a reservation of those not granted.* Citizens might share it, but the Indians were secured in its enjoyment by special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places' and the right 'of erecting temporary buildings for curing them'." (Emphasis supplied)

In that case the parties adverse to the Indians argued that since they had the right to fish in common they had a right through their mechanical ingenuity and superior knowledge to construct a device (a fish wheel) which took all the fish and so the Indians could get none. The court in rejecting that contention said, 49 L. ed. at page 1093:

"But the result does not follow that the Indians may be absolutely excluded."

The court further said:

"The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess."

Those arguments and statements of the court are extremely appropriate to the contention of the State here that the Makah Indians may purchase expensive boats and equipment and compete in fishing in deep

salt water with over one thousand other boats owned and operated by white men and that their right so to do satisfies the requirements of the treaty. As the Supreme Court observed, such a result would certainly be an impotent outcome to the negotiations leading to the treaty.

It was also said in the *Tulee* case, 315 U.S. 681, 86 L. ed. 1115, at page 1120:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L. ed. 1089, 25 S. Ct. 662, this court held that, despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed place' in the ceded area; and *Seufert Brothers Company v. United States*, 249 U.S. 194, 63 L. ed. 555, 39 S. Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in the spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

A regulation is not consistent with the treaty merely because it applies to all persons indiscriminately. In other words, as held directly in the *Winans* case and the *Tulee* case, the words "in common" did not give the State power to impose any regulations it saw fit merely because it made them applicable alike to Indians and non-Indians. As the court in those cases pointed out, the rights reserved to the Indians were important and substantial and since they were reserved rights as compared with the granted rights to the whites their rights were and are substantially greater than the non-Indians. So it appears that it is no answer for the State to say that they have the right of prohibition as long as they equally prohibit non-Indians.

Since the whites were granted the right to fish "in common," and in view of the interpretation thereof by the Supreme Court in the *Tulee* and *Winans* cases, it would seem that it would be proper to construe the treaty to mean that the Indians agreed to some form of regulation which would in effect protect the right of the whites to fish in common and that such regulation might be imposed by any appropriate governmental agency. From this it must be concluded and conceded by the plaintiffs that they may not insist upon an unrestricted right to fish in such a manner that they totally destroy the run of fish, whether the means of accompishing that end would be by their ancient fishing gear or by more modern equipment. Likewise it would not seem to be a reasonable construction of the treaty to say that the Makahs agreed that they would never

fish except by their ancient methods, particularly if those methods were curtailed. This was quite clear because, as shown by plaintiffs' Exhibit 8, Governor Stevens promised to furnish them with better fishing equipment than they then had (Pls.' Ex. 8, p. 21).

A more reasonable interpretation of the treaty would be that the Makahs were secured not in any particular manner of fishing but in their right to take from the Hoko River, the title to which they were ceding to the United States, fish in a substantial quantity as an important element of their tribal economy. In other words, this was the *quid pro quo* of their agreement. This *quid pro quo* was what they insisted on rather than any particular method of securing it.

It is apparent from the treaty negotiations that what the Indians wanted, and all they wanted, was the right to take fish in the quantity which was essential to their economy. It is clear that they understood that was what they were quaranteed by the treaty. It has so often been said as to be no longer open to argument, that treaties should be construed as the Indians understood them.

> *Seufert Bros. Company v. U. S.*, 249 U. S. 194, 63 L. ed. 555;
>
> *Worcester v. Georgia*, 31 U. S. 515, 8 L. ed. 483;
>
> *Tulee v. Washington*, 315 U. S. 681, 86 L. ed. 1115.

The appellants, therefore, take the position that

since the regulation of the Defendant amounts to a virtual prohibition of their fishing in the Hoko it violates their treaty rights. The appellants concede that, under the language of the *Tulee* and *Winans* cases *supra,* defendant may make regulations as to the manner, methods and times the Makahs may fish at the Hoko so long as the fish to be taken by the allowed methods, times and means and within the resources of the river results to them in their receiving the *quid pro quo* of their agreement. This was the purpose in presenting, insofar as it could be accomplished from present living witnesses, the evidence as to the use of the Makahs by the Hoko caught fish in the olden days. It appeared that the Hoko was important because as the Makahs fished all summer and stored their smoked and cured fish supplies for the winter when the fall salmon run appeared in the Hoko they took stock and determined what more they needed to tide them through and this deficiency was supplied by the salmon from the Hoko. Likewise, now, with the Makahs greatly dependent upon a fish economy and with the prospect that in the very near future as the logging on the reservation is completed, this will become increasingly so, the Hoko and its fall salmon run still play an important part in their economy.

The trial court apparently misunderstood the appellants' position for he inferred that we were asking that the Supreme Court holdings be ignored (R. 29). Unfortunately the lack of oral argument prevented us from correcting this misconception.

It is the appellants' position that it is the sum

total of the prohibitions contained in the regulation which violate the treaty. Individually and singly the various prohibitions might or might not do so. It was impossible for the appellants to segregate the good from the bad. The appellants attacked the regulation in toto and did ask, and now ask, the court to declare the regulation invalid as against these treaty rights. We take it that the question that presented itself to the court's mind was, "What then is the result if it is not a total freedom from restriction?" The result is that it would then be incumbent upon the Director of the Department to draft a substitute regulation which would grant to the plaintiffs the right guaranteed to them by the treaty and still limit the catch in such a manner that the run of fish would not be destroyed. Undoubtedly the discussion by the court of the rights of the parties would furnish a standard to the Director for such a regulation. Such a procedure leaves a great deal of flexibility and discretion to the Director in the selection of the times and methods, etc., of fishing, which is only right and proper because he is in a position to be advised by those expert in the field. This it seemed to plaintiffs was the only possible procedure.

VI.

The Almost Total Prohibition Imposed by the Present Regulation Is Not "Necessary."

What is or is not "necessary" will, of course, vary with the circumstances and context within which the word is used. The context here is that there is in existence a treaty right which is a solemn obligation of the United States arrived at in the course of dealing with a people to whom the United States owe a duty of protection.

> *Winters v. U. S.*, 207 U. S. 564, 52 L. ed. 340;
>
> *Tulee v. Washington*, 315 U. S. 681, 86 L. ed. 1115.

The rights so guaranteed have been interpreted by the Supreme Court as being subject to "necessary" limitations. *Tulee v. Washington, supra.* The "necessary" limitations should be strictly construed in order to give the guaranteed rights the liberal construction to which they are entitled.

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred * * *." *Nielsen v. Johnson*, 279 U. S. 47, 73 L. ed. 607

Any ambiguity in the limitation to which it may be said the Indians agreed should be construed in their favor.

> *Worcester v. Georgia*, 31 U. S. 515, 8 L. ed. 43;
>
> *Winters v. U. S., supra.*

The defendant's proof that the present regulation was necessary was largely, if not entirely, to the effect that he lacked the necessary manpower to enforce a less strict regulation. In view of the importance and solemnity of the obligation imposed by the treaty such a showing is insufficient to establish "necessity."

The trial court, however, apparently adopted the view of the defendant, for he said:

> "The defendant has available only an insufficient patrol service if the plaintiffs are free from conservation regulations." (R. 30)

(The court must have meant that the defendant has only an insufficient patrol service if the plaintiffs are subject to a *limited* conservation regulation, for, obviously, if there were no conservation regulation no patrol at all would be needed).

A somewhat similar argument was made in the *Tulee* case where it was contended that the license requirement was necessary because it was a generally convenient and fair method of accomplishing the purposes for which it was intended. The court there held that the fact that it was convenient and its general impact fair did not prevent it from contravening the treaty rights of the Indians.

The plea of the lack of funds for adequate patrol in itself seems incredible in view of the facts that the Hoko is only twenty to fifty feet wide (R. 285), eighteen miles long (R. 263); that the fall fishing season lasts only about two months and the defendants' annual budget is in excess of One Million Dollars (R. 246).

Aside from these considerations, the facts belie the stated opinions of the defendant's partisan experts that the regulation was necessary. It was uncontradicted that the Makahs had fished the Hoko since at least 1900 with gear which they secured from the white men (R. 155, 156, 132) and sold these fish to buyers who were on the spot with tenders (R. 156), yet in 1932 when the only survey that the department has undertaken was made, the report was that the River had a "fairly large" run of silver salmon (R. 317). Shortly thereafter, the department stopped the fishing of the Makahs.

Since the right to take fish from the Hoko was undeniably guaranteed the Makahs by their treaty and since they are now denied the right to take fish from that River, the burden of proving the necessity of such a prohibition lies with the defendant, and this was recognized by the defendant in his pleading, yet there was a total failure of any proof that the silver run of the Hoko River is diminished, reduced, or depleted to any degree whatsoever. In the first place, the defendant's witnesses admitted that no count has ever been made in the Hoko as it has in other streams (R. 249, 250). Secondly, there was no evidence of any depletion at any time even when the former injunction obtained by the Makahs was in effect. The defendant's Chief Inspector testified on direct examination as follows:

> "Q How did the runs at that time (1943) compare with the runs that were in the River in abundance at the time you first observed there?"
>
> A Well, the River, like other streams has its

ups and downs. Some years there is a fair amount of silver salmon in there, and other years there apparently are not as many.

Q Has there been an increase or decrease in the abundance of fish in the stream during the time you have had the stream under your observation?

A I am afraid I cannot answer that question * * *." (R. 287)

Likewise, the chief biologist for the Department of Fisheries testified on direct examination that "I would hesitate to say that the River (Hoko) is capable of producing a larger silver run than is now in it" (R. 318).

He conceded further that regulations could be made which would permit the taking of fish without endangering the run (R. 324, 325).

Furthermore, it was stated by the Department's chief biologist that the real danger is not from fishing on the Hoko but from the fishing in the mouth of Puget Sound.* In attempting to explain why the Department allowed a limited commercial fishery, to-wit, gill netting, on the streams flowing into the Pacific Ocean but not on those flowing into Puget Sound he said as follows:

"The runs of fish as they enter Puget Sound through the Straits are fished by a large purse seine fleet. When this purse seine fleet operates,

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*It is apparent from the context that the witnesses followed the common local practice of referring to all waters out to the ocean as "Puget Sound" although technically, of course it does not extend so far westward.

> particularly in the odd years, when they go out for pink salmon, it operates on the Cape (Flattery). They have in the past got more silver salmon than the troll fleet, and the total catch is enormous.
>
> "Now, we have the possibility of these two fleets congregating on the silver salmon that enter Puget Sound, and for that reason we feel that a limited commercial fishery is justifiable on the ocean streams, whereas it is too dangerous to operate on the Puget Sound streams."

From this it is clear that the Department creates its own "necessity" by permitting such a vast fishery at the mouth of Puget Sound. The right of the Indians to take fish at their usual and accustomed ground should be protected by the courts rather than the right granted by the defendant to the purse seine fleet to take the fish to the exclusion of the Indians. The following language from the case of *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, at 231 is appropriate:

> "Because of the local ill feeling, the people of the states where they (the Indians) are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and the Congress, and by this court whenever the question has arisen."

The situation is similar to that in the *Winans* case (198 U. S. 371, 49 L. ed. 1089) wherein it was argued

that it was not inconsistent with the treaty to license the white men to take fish by means of a fish wheel which prevented any fish from going up to the Indians' grounds and that the white men had this right by virtue of their right to fish "in common." The Supreme Court disposed of that contention by saying that the Indians could not by such means be excluded. That is no different from the defendants position here that because he allows large purse seine fishery at the mouth of the Sound he can not allow any further fish to be taken by the Indians at their usual and accustomed place.

CONCLUSION

It is respectfully submitted that the judgment and decree of the trial court dismissing the complaint was erroneous and should be reversed and that the cause should be remanded to the trial court for the entry of an injunction substantially in accordance with the prayer of plaintiffs' complaint.

Respectfully submitted,

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APPENDIX A

Abstract of Plaintiffs' Exhibit 8

TREATY OF NEAH BAY

"MONDAY, JANUARY 29TH. The Schooner reached Neah Bay on the evening of the 28th, and today the tents, goods and men were landed and the camp established. Governor Stevens, the agent and interpreter immediately put themselves in communication with the Indians of the Bay through the medium of Capt. E. S. Fowler, a Kallam Sub-chief called Capt. Jack, who spoke the Makah language, and two Makahs Iwell Or Jefferson Davis and Peter who spoke Chinook. Expresses were immediately sent off to bring in the other Makah Villages and also if possible the tribes adjoining them on the Coast.

"TUESDAY, JAN. 30. Gov. Stevens and the Secretary (George Gibbs) crossed the Peninsula of Cape Flattery to the Coast for the purpose of making a general examination of the country and selecting a spot suitable for the separate reserve of this tribe and such others as might be included with them. The Indians of the other Makah Villages arrived today but stated that the other tribes could not be called in until several days. It was accordingly determined to send for them to meet at Grays Harbor. In the evening Governor Stevens called a meeting of the Makah Chiefs on board the Schooner to hear the details of the proposed treaty more particularly. Being interrogated as to their relations with the tribes below them, they said that with the Kive-deh-tut or Kwilleh-yeites they were on terms of amity, as also with the Kwaaksat or Hooch, but that with the next band or tribe the Kivites or Kehts ahuat, they were not, that tribe having killed one of their people once years ago. They did not however desire to cherish any animosity, but did not know the

feelings of that tribe towards them. They were directed to make a full return of each of their own villages the next day.

"Governor Stevens then informally mentioned the principal features of the proposed treaty as follows, 'The great Father has sent him here to watch over the Indians. He had talked with the other tribes of the Sound, and they had promised to be good friends with their neighbors and he had now come to talk with the Makahs. When he had done here he was going to the Indians down the Coast and would make them friends to the Makah. He had treated with the Sound Tribes for their land, setting aside reserves for them and had stipulated to give them a school, farmer, etc., and a physician, when he had finished.

"KAL-CHOTE OF NEAH BAY spoke, 'Before the big Chiefs (Kleh-silt, the White Chief, Yellacoon or Flattery Jack and Heh-iks) died he was not the head chief himself, he was only a small chief, but though there were many Indians there, he was not the least of them. He knew the country all around and therefore he had a right to speak. *He thought he ought to have the right to fish and take whales and get food where he liked. He was afraid that if he could not take halibut where he wanted, he would become poor.*'

"KEH-CHOOK of the Stone House followed—'What Kalchote had said was his wish. *His country extended up to Hoke-ho. He did not want to leave the salt water.*'

"GOV. STEVENS informed them that so far from wishing to stop their fisheries, he intended to send them oil, kettles and fishing apparatus.

"KLAH-PE-AT-HOO of Neah Bay. 'Since his brother died, he had been sick at heart (his brother was the late 3d chief) *He was willing to sell his land; all he wanted was the right of fishing.*

"TSE-HAU-WTL—'He wanted the sea! What was his country if whales were killed and floated ashore, he wanted for his people the exclusive right of taking them and if their slaves ran away, they wanted to get them back.'

"GOVERNOR STEVENS replied that he wanted them to fish but that the whites should fish also. Whoever killed the whale was to have them if they came ashore. He added as a reason for buying their land that many whites were coming into the Country and that he did not want the Indians to be crowded out.

KALCHOTE *resumed*—'He wanted always to live on his old ground and to die on it. He only wanted a small piece for a house and would live as a friend to the whites and they should fish together.'

"KAH-PE-AT-HN—'He and Kalchote lived together. They did not want to leave their old home.'

"TEE-KAW-WTL—said the same thing. He too only wanted his house.

"KEE-BACH-SAT *of tso-yeas*—'My heart is not bad but I do not wish to leave all my land. I am willing you should have half, but I want the other half myself. You know my country. I want part for my village. It is very good. I want the place where the stream comes in.'

"HAATSE his brother was of the same mind.

"IT-AN-DAHA of Waatch—'My father my father! I now give you my heart. When any ships come and the Whites injure me I will apply to my father and will tell him of my trouble and look to him for help, and if any Indians wish to kill me, I shall still call on my father. *I shall submit all my difficulties to him; my wish is like the rest, I do not wish to leave the salt water. I want to fish in common with the whites.* I don't want to sell all the land. I want a part

in common with the whites to plant potatoes on. I want the place where my house is. We do not want to say much, we are all of one mind. I have no particular country myself, mine and that of the Tse-Kaw-Wtl are the same.'

"KAL-CHOTE again—'I do not want you to leave me destitute. I want my house on the Island (Tatoosh Island, commonly called the Stone House).

"GOVERNOR STEVENS asked '*whether if the right of drying fish wherever they pleased was left them, they could not agree to live at one place for a winter residence and* potato ground explaining the idea of subdivision of lands and he desired them to think the matter over during the night. They were also directed to consult among themselves upon the choice of a head chief. As they declined doing this on the ground that they were all of equal rank, he selected Tse-kow-wootl, the Ozette Chief as the head. A choice in which they all acquiesced with satisfaction.

"Temporary papers in lieu of commissions were then issued to Kal-chote, and Klah-pe-at-hu of Neah, Kah-tchook of the Stone House) (Tatooch I) It-an-da-ha and Waatch Heatse and Kebach sat of Tasoyess as sub chiefs.

"COL. SIMMONS then explained to them that 'these papers were given them as evidence that they were chiefs, that as such they must take care of the people, and that by and bye the great papers would be given them. On his former visit they had declined to receive papers, but now they were evidently much valued.' The general council was then adjourned to the next day.

"JANUARY 31, WEDNESDAY—The heads of the Treaty had been adjusted and on the morning the Indians were again assembled. Two additional sub-chiefs received papers, viz: Tsha-a-kowtl of Osett and

Kats-kussum of the Stone House. The number of the whole tribe was found to be 600. Governor Stevens then addressed them: 'My children I have seen many other of my children before you. They have been glad to see me and to hear the words of the Great Father. I saw the Great Father a short time since and he sent me here to see you and give you his mind. The whites are crowding in upon you and so the Great Father wishes to give you your homes. He wants to buy your land and give you a fair price but leaving you enough to live on and raise your potatoes. He knows what whalers, you are, how you go far to sea, to take whales. *He will send you barrels in which to put your oil, kettles to fry it out, lines and implements to fish with.* The Great Father wants your children to go to school and learn trade and this will be done if we agree today, I am now about to read you a paper, If you like it, we will sign it. If it is good I shall send it to the Great Father and if he likes it he will send it back with his name. If he wants it altered he will let you know, when it is agreed to, it is a bargain.'

"The treaty was then read to them, interpreted clause by clause and explained.

Governor Stevens then asked if they were satisfied. If they were to say so. If not to answer freely and state their objections.

"TSE-KNW-WTL brought up a white flag and presented it saying—'Look at this flag, see if there are any spots on it. There are none and there are none in our hearts.'

KSI-CHOTE presented another flag—'What you have said was good and what you have written is good.'

"The Indians gave three cheers or shouts as each concluded. The governor then signed the treaty and followed by the Indian chiefs and principal men.

"The Treaty is as follows:

NOTE: Here follows the Treaty with the Makahs on January 31, 1855, 12 Stat. p. 939; Vol. 2, Cappulars Law & Treaties, p. 510.

"The presents were afterwards distributed and in the evening the party reembarked. Owing to the wind the vessel did not reach Port Townsend till the 3rd of February. The next day (February 4th) Gov. Stevens left with some of the party in the steamer Mayor Tompkins for Victoria in order to confer with Gov. Douglas on the subject of the Northern Indians and on the 5th returned to Port Townsend and reached Olympia on that night of the 6th."

[*All italics supplied*]

APPENDIX B

TREATY WITH THE MAKAH, 1855
Jan. 31, 1855
12 Stat., p. 939
Proclamation, Apr. 18, 1859
Ratified Mar. 8, 1859

"Article of Agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah Tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

"Article I. The said tribe hereby cedes, relinquishes and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately *deded* to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

"Article II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning, which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through said reservation, the Indians being compensated for any damage thereby done by them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

"Article III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any laid claimed or occupied, if with the permission of the owner.

"Article IV. The right of taking fish and of whaling or sealing at usual and accustomed

grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

"Article V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years; one thousand dollars each year; all of which said sums of money shall be applied to the use and benefits of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

"Article VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon

in consequence of this treaty, shall be valued under the direction of the President and payment made therefore accordingly.

"Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable places within said Territory as he may deem fit, on remunerating them for their improvements and expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

"Article VIII. The annuities of the aforesaid tribe shall not be taken to pay debts of individuals.

"Article IX. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens thereof, and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-

defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

"Article X. The above tribe is desirous to exclude, from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

"Article XI. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification heerof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter, and farmer for the like term to instruct the Indians in their respective occupations. Provided, however, that it should be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States

further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

"Article XII. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

"Article XIII. The said tribe finally agrees not to trade at Vancouver Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

"Article XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States."

In the

United States Court of Appeals

For the Ninth Circuit

MAKAH INDIAN TRIBE, a Corporation, CHARLES E. PETERSON, DAVID C. PARKER, KENNETH WARD, JOHN H. IDES and CLIFFORD JOHNSON, Individually and as Members of the COUNCIL OF THE MAKAH INDIAN TRIBE, *Appellants,*

v.

MILO MOORE, Director of the Department of Fisheries, State of Washington, *Respondent.*

No. 12751

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

ADDITIONAL STATEMENT OF CASE.

Within the limits of the statement of the case by the appellants, we take no serious objection, but for the purpose of a better understanding of respondent's position, we submit the following additional statement of the case.

Appellants by their complaint sought a decree enjoining the respondents, among other things, from attempting to apply the laws of the State of Washington and the regulations of the Fisheries Department to the

plaintiffs; from prohibiting members of the appellant tribe from selling, trading, or bartering any fish caught in the waters of the Hoko River or Puget Sound adjacent thereto, and of catching fish for the purpose of such sale, trade or barter; prohibiting the appellants or any members of the Makah Tribe of Indians from clubbing, gaffing, shooting, snagging, snaring, worrying, spearing and stoning fish (R. 13).

The plaintiff alleged, among other things, that the respondent was interfering with the appellants' accustomed right to fish with seines, set nets, dip nets, clubs, spears, traps and other fishing gear in the Hoko River and the waters of the Puget Sound adjacent thereto (R. 6).

The appellants at the trial presented their case upon the theory that they were entitled to the relief asked for in their complaint. The respondent's position at the trial was that the regulation of fishing imposed was operative on all persons alike, reasonably adapted to the preservation of the salmon in the waters of the State for the common benefit of all citizens. The appellants' testimony established that salmon in approaching their spawning grounds schooled in great numbers in the ocean (R. 307); that as the salmon moved toward the mouths of the stream where the spawning area of the particular salmon is located, these salmon split off from the mass of fish and enter the estuary of their particular stream (R. 234, 250, 251). Substantially all of the streams in the State of Washington have an estuary (R. 251). The salmon, on entering this estuarial area, cease to feed and in the brackish water commence to feel the influence of the fresh water. They may stay in the stream for some time and when the fresh water conditions are right, they move up

the stream and proceed to their spawning ground (R. 250, 251). While in the estuarial area of the stream there is such a concentration of fish, and particularly in such a small stream as the Hoko River, the stream could be blocked and all fish removed (R. 254), with the result that an entire run of fish might be taken and the fish population of that particular stream dependent upon that particular run of fish would be gone forever since streams are not reseeded by stock from another stream (R. 254-255). Fish in the stream and in the spawning areas could be eliminated by spearing and other methods (R. 256, 310, 311).

Where the large schools are fished in the ocean, far from the mouths of the stream, and where the fish population is mixed, the danger of wiping out the spawning population of a particular stream is materially lessened (R. 250). It was the opinion of the experienced personnel of the Fisheries Department of the State of Washington that the Hoko River would not stand commercial fishing (R. 295). The experience of the Fisheries Department was that the supply of salmon in the State of Washington had been on the decline for several years (R. 322). The capacity of streams to produce fish had been lessened by many factors, including overfishing, deforestation, use of waters for other purposes, destruction of dams and other obstructions to the original flow of water (R. 303-305). It was the opinion of the expert personnel of the Fisheries Department that the regulations complained of were reasonably necessary to conserve the supply of salmon (R. 295, 305, 309). It was established that once substantial runs of Chinook salmon in the Hoko River had disappeared (R. 116, 117, 140). The opinion of the personnel of the Fisheries Department was based not only upon

the experience of the Fisheries Department in waters of Puget Sound but also in Alaska and other waters (R. 314-315).

The Department of Fisheries carries on an extensive hatchery of fish and artificially augments streams by planting fish, including several streams that run through Indian reservations. The respondent Department does not have the means to police the some 20 streams in the area in which the Hoko River is situated (R. 289, 290, 317). During the time the injunction was in force against the Department in the previous action between the Makah Indian Tribe and the Director of Fisheries, the Makah Indians fished the Hoko River and fished off the mouth of the river. Purse seine boats, drag seines and innumerable set nets were placed in the river itself and in the estuary, and the fish were molested the entire area of the river up to and including Hoko Falls where the fish were gaffed and taken out (R. 291, 292). About 20% of the adults of the Makah Indian Tribe engaged in commercial fishing in the waters of Puget Sound (R. 95, 97), and in 1948 the income to the Makah Indians from this fishing was approximately $7900.00 (R. 280).

The ultimate aim of the State of Washington and its Fisheries Department is to regulate the fishers so as to allow an adequate escapement to every stream in the State and to allow the fisheries to take that portion of the run that will not affect the future of that run (R. 305). The State of Washington has an established research program designed to accomplish this ultimate aim (R. 305).

The appellants submitted no evidence that the laws of the State of Washington or the regulations of the Fish-

eries Department applicable to fishing in Hoko River, as well as other streams, were unreasonable or unnecessary.

The trial court found that at the time of the ratification of the treaty in 1859 the Makah Indians had not fished the waters of Puget Sound adjacent to the Hoko River and it was not until several years thereafter that the Makah Indians fished in the Sound; that therefore the waters of Puget Sound were not a fishing ground or station guaranteed or secured by the treaty (R. 25); that the method of fishing by the Makah Indians had materially changed since the time of the treaty and that a substantial share of the total income of the Makah Tribe now comes from ocean salmon fishing (R. 26); that to permit the appellants to take the salmon when concentrated off the mouth of the Hoko River would in three or four years result in the elimination of the salmon run in the Hoko River; that the use of spears and nets in the river would quickly eliminate the salmon runs; that for several years past the salmon which entered the Hoko River were not salable and probably inedible (R. 30); that the regulations of the respondent were reasonable, fair and requisite, and did not discriminate against the Indians (R. 31).

ARGUMENT

The Laws and Regulations in Issue Here Are Valid Exercises of the Police Power of the State of Washington.

The power of the State to make and enforce regulations operative on all persons alike, reasonably adapted to and necessary for the preservation of wild life in the waters of the State for the common benefit and not intended to operate as a denial to the privileged Indian community of its right to fish, has been established as a lawful exercise of the police power of the State in the following cases:

Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244;
Coyle v. Smith, 221 U. S. 559, 55 L. Ed. 853;
U. S. v. Winans, 198 U. S. 371, 49 L. Ed. 1089;
State ex rel. Kennedy v. Becker, 241 U. S. 566, 60 L. Ed. 1166;
Tulee v. Washington, 315 U. S. 681, 86 L. Ed. 1115;
McCauley v. Makah Tribe, 128 Fed. (2d) 867.

In the instant case there is no contention that the regulations imposed by the State were arbitrary or capricious, but on the contrary the record fully supports the trial court's finding that the regulations were fair, reasonable and requisite.

Appellants take the position that because of their claim that at the time the Treaty was executed the Tribe's use of fish in the Hoko River was unlimited, the State may not substantially limit the taking of fish from the Hoko River by the Tribe at the present time. Such a position is unrealistic and ignores present conditions that require, as established by the record, substantial regulations in order to conserve and perpetuate the salmon as a self-producing natural resource of the State of Washington. The conditions that existed at the time of the execu-

tion of this Treaty are entirely different from those that exist today. In considering the regulations in question and the Treaty rights of the appellants, we believe that the formula for such consideration is well stated in *State ex rel. Kennedy v. Becker*, *supra*, wherein the Supreme Court said:

> "It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans,* 198 U. S. 371, 384, 49 L. Ed. 1089, 1903, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 (12 Stat. at L. 951), said (referring to the authority of the

> State of Washington): 'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.' "

Applying the foreging rule, it is submitted that an interpretation of the Treaty must grant to the sovereign state the right to make reasonable regulations for the preservation of the supply of salmon as a natural resource of the State of Washington. The reservation of the Makah Tribe of the privilege of fishing in the Hoko River was necessarily subject to the right of the State to make appropriate regulations. In this connection, it should be pointed out that the appellants make no contention that the regulations are arbitrary or capricious or even unreasonable or unnecessary. Their complaint is that the regulations deprive them of the right to fish in the Hoko River except by hook and line. This deprivation of the privilege of fishing is, however, but incident to the reasonable and necessary conservation regulations, and the Indian citizens as well as all other citizens must bear the burden of such prohibition.

The appellant strongly relies upon the case of *U. S. v. Winans, supra.* This was an action brought by the United States to enjoin Winans Bros., who were engaged in a large commercial fishing enterprise, from refusing the Indians access to their ancient fishing places and depriving them of fishing rights by the actual monopoly of fishing privileges through maintenance of fishing wheels. The Supreme Court very properly sustained the Indians in their treaty guaranties against discrimination. The only issue involved was the land owner's attempt to ignore the Indians' easement. The land in question had passed from the Federal Government by patent title to a white

owner, who in addition had secured from the State of Washington a license to erect and operate a fishing wheel. The court held that the white owner had made it impossible for the Indian to enjoy fishing privileges on a parity with "citizens of the Territory." The case decided that the government grantee came into possession of land which was impressed with a perpetual servitude or easement, and even the State could not grant something additional which would impair that easement. This was not a case brought against the State to restrain the exercise of its inherent police power, but involved an invasion by private individuals of the rights of the Indians thereby discriminated against as a class, and so in this essential aspect the facts of the *Winans* case differ from the facts of the case at bar. After making clear that the provision in the treaty imposed a servitude on land which could not be extinguished, the court said, at p. 384:

> "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easement as enables the right to be exercised."

The case is positive authority for the power of the State to regulate the taking of fish within its boundaries.

The case of *Tulee v. Washington, supra,* involved a treaty substantially the same as the treaty in the instant case and raised the question of the power to exact a license fee for the purpose of revenue from an Indian. The Supreme Court held "that while the treaty leaves the State with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,

it forecloses the State from charging the Indians a fee of the kind in question." *

This court in *McCauley v. Makah Indian Tribe, supra,* had before it the same treaty as here involved. The case was before the trial court for a motion for judgment on the complaint. The complaint alleged and the trial court found that the Makah Indians prior to the treaty had customarily fished in the Hoko River "with seines, set nets, dip nets and other Indian fishing gear." The trial court held that the treaty guaranteed the Indians' right to fish with such gear and the judgment enjoined the defendant state officers from "in any manner whatsoever interfering with the exercise by the plaintiffs herein, or any of the members of the Makah Indian Tribe, of their rights and privilege of fishing in their usual and accustomed place (Hoko River hereinabove described)." The statute of the State of Washington, Rem. Rev. Stat., 5671-8, considered by this court, provided:

> "Pound nets, traps and other appliances prohibited. It shall be unlawful to construct, install, use, operate or maintain, within any of the waters of the State of Washington, any pound net, fish trap, fish wheel, scout fish wheel, set net, wier, or any fixed appliance for the purpose of catching salmon, salmon trout or steelhead, or to take salmon, salmon trout or steelhead by any such means."

This court reversed on the grounds that the decree of the court, in protecting the Indians' right to fish with "other Indian fishing gear," contained no finding as to what "other Indian fishing gear" might be. As this court pointed out, the gear might include one or another of the

* It is significant that the Supreme Court stressed the point that the license was for revenue as well as regulation; that the license imposed a charge upon the Indians' right to fish. Had the statute imposed a burden purely regulatory, it is believed the decision would have been different.

fixed appliances prohibited for the conservation of fish by the Washington statute above quoted. This court held that allowing fishing that was in violation of the conservation regulation of the State of Washington would be not in accord with *Tulee v. Washington, supra.*

This court, in reversing, granted the appellants (the Makah Tribe) permission "to amend their complaint and present their right to such claimed allowable methods of fishing, specifically described and not by such a general term as 'other Indian fishing gear' as they may be advised."

It is our position that this court, in this decision, restricted the right to fish to *allowable methods* under the Washington conservation statute. Since the type of fishing which the appellants specifically claim in the instant case clearly falls within the prohibition of the Washington statute, we submit that *McCauley v. Makah Indian Tribe*, *supra*, is conclusive of the issues in the instant case against the appellants herein.

This case is likewise conclusive against the appellants' prayer that the respondent be restrained from "prohibiting appellants from selling, trading or bartering any fish caught in the waters of the Hoko River or of the Puget Sound adjacent thereto and of catching fish for the purpose of such sale, trade or barter." The record is silent as to any threatened interference and for the further reason, as pointed out by this court, the treaty "is silent on the right of the Indians to dispose of fish by sale or barter."

This case is likewise conclusive against the appellants in their prayer that the respondent be restrained from interfering with their fishing in the waters of Puget Sound

adjacent to the Hoko River for the reason that the appellants failed to establish that the Indian Tribe had ever fished in Puget Sound at the time of the treaty. In fact the only evidence indicated that the Tribe commenced fishing in Puget Sound several years after the execution of the treaty, and therefore it cannot be held that such waters were a fishing ground or station reserved in the treaty by the Makah Tribe.

The Regulations Complained of Are Reasonable and Necessary.

It is submitted that the cited portions of the record fully establish the fairness and reasonableness of the respondent's regulations. In the instant case the inherent power of the State is being exercised for the benefit of the appellants as well as all other citizens towards the end that the salmon industry of the State of Washington may be preserved. It is idle to say that the State has the power to regulate and in the same breath to say that the Indians may exercise a claimed ancient custom of taking fish regardless of the sound principles of conservation and a custom which, if permitted, would destroy the salmon resource. The record fully supports the succinct finding of Judge Black in his oral opinion wherein he said:

> "Under the evidence the conservation laws and regulations applicable to and being applied to the Hoko River and waters of Puget Sound adjacent thereto are entirely reasonable and moreover, are clearly necessary for the conservation of the salmon life in the Hoko River, and are essential and requisite for the existence of any salmon in the future in said stream. It is noteworthy that there was no evidence at all submitted to the effect that the regulations or laws were unreasonable or unnecessary. The plaintiffs have satisfied themselves with such showing as they made of certain fishing by Makah Indians in

the Hoko River, and with contending that under the treaty they were immune from conservation laws or regulations." (R. 24.)

As found by Judge Black in his opinion, the regulations clearly inure to the benefit of the appellants in that the regulations insure to the appellants a reasonable supply of salmon off Cape Flattery, from which supply the appellants have been and are benefiting through their commercial fishing.

We feel it is unnecessary to unduly extend this brief by extensive quotations from the record, and it is respectfully submitted that the record fully supports the findings of the trial court and that the judgment appealed from should be affirmed.

Respectfully submitted,

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